Barbara Lim Cheng Sim v Uptown Alliance (M) Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S-23–120 OF 2009
SU GEOK YIAM J
13 NOVEMBER 2013

Civil Procedure — Documents — Discovery of documents — Employment Audit Report ('EAR') — Privilege from production — Whether defendants could be compelled to EAR for purposes of full trial — Alternatively, whether defendants ought to be disallowed from making any reference to EAR in their defences — Whether defendants could be compelled to amend their defences in order to delete all references to EAR therein — Whether all references to EAR in defendants' defence ought to be struck out — Whether claim or objection valid — Rules of Court 2012 O 24 rr 12, 13, O 18 r 19(1) & O 92 r 4

Civil Procedure — Res judicata — Discovery of documents — EAR — Whether plaintiff entitled to Employment Audit Report ('EAR') already decided by court — No appeal filed by plaintiff against decision — Whether plaintiff's application for production of EAR caught by doctrine of res judicata — Whether application mischievous and abuse of the process of court — Whether application ought to be disallowed

Evidence — Privilege — Legal professional privilege — Employment Audit Report — Documents prepared by solicitors upon instructions of clients — Whether legally privileged document — Whether only client could waive legal professional privilege — Whether waiver by implication or imputation recognised — Evidence Act 1950 ss 126, 127, 128 & 129

The plaintiff's application was to compel the defendants to produce the Employment Audit Report ('EAR') for the full trial on the ground of waiver of privilege. Alternatively, to disallow the defendants from making any reference to the EAR in their statements of defence ('defences'), in their documents in the common bundle of documents ('CBD') and in their witness statements. Further, to compel the defendants to amend their defences in order to delete all references therein to the EAR, failing which, all the references to the EAR in the defences must be struck out by the court. In opposing and resisting the plaintiff's application, the defendants contended, inter alia, that the said application was mischievous and was an abuse of the process of court. This was because of the doctrine of res judicata, as the issue whether the plaintiff was

entitled to discovery of the EAR had already been litigated and decided by the High Court when the court dismissed the plaintiff's application for discovery of the documents, encl (19), which included the EAR specifically and there was no appeal filed by the plaintiff against that decision. The defendant further alleged that legal privilege in the EAR lies with Tiffany & Co, New York because the EAR, being an advice prepared by solicitors for Tiffany & Co, New York, is a legally privileged document and, therefore, s 129 of the Evidence Act 1950 bars the EAR from being admitted into evidence during the full trial of the plaintiff's case against the defendants. Besides the above, this application should be dismissed as the plaintiff's allegations and averments concerning the waiver of the legal privilege by the defendants was merely by virtue of the references which the defendants had made to the EAR in their defences, their documents in the CBDs and in their witness statements are frivolous and vexatious. The issues raised for the determination of this court are as follows: (i) whether the defendants could be compelled by the court to produce the EAR for the purposes of the full trial of the plaintiff's claim against the defendants; (ii) alternatively, whether the defendants ought to be disallowed from making any reference to the EAR in their defences, in their documents in the CBD's and in their witness statements; (iii) whether the defendants could be compelled by the court to amend their defences in order to delete all references to the EAR therein; and (iv) alternatively, whether all references to the EAR in the defendants' defences ought to be struck out immediately by the court.

Held, dismissing the plaintiff's application with costs of RM15,000:

(1) The plaintiff's application had no merit based on Malaysian law. The plaintiff had failed to adduce any evidence to demonstrate that Tiffany & Co, New York, the owner of the legal professional privilege in the EAR, and not the defendants, had waived its legal professional privilege in the EAR by giving its express consent in writing to Wong & Partners for the disclosure of the EAR to the plaintiff, thereby justifying its disclosure to the plaintiff and its production in the court for the purposes of the full trial of the plaintiff's claim against the defendants (see para 45).

(2) Therefore, upon applying the law as contained in ss 126 to 129 of the Evidence Act 1950 to the facts, the plaintiff's contention that there had been a waiver by the defendants of the legal professional privilege in the EAR was wholly misconceived because the defendants, who are third parties to the preparation of the EAR, could not by any stretch of the imagination be said to own the legal professional privilege in the EAR let alone waive it (see para 48).

(3) Subsequent to filing her statement of claim ('SOC'), the plaintiff had made repeated unsuccessful attempts, to compel the defendants to disclose the contents of the EAR by giving to the plaintiff a copy thereof. In this respect, by virtue of the doctrine of res judicata, the plaintiff could

no longer reopen the issue whether the EAR was a document protected by legal professional privilege since it had chosen not to appeal to the Court of Appeal against the decision of Zabariah bt Yusof J. learned judge had held that the EAR was protected by legal professional privilege. Hence, the plaintiff could not reopen the issue whether the EAR was protected from disclosure by legal professional privilege by virtue of the said decision (see paras 80–82).

(4) The defendants in the instant case were not relying on the contents of the EAR to prove their defences and counterclaims against the plaintiff. This was so, even though the defendants had made references to the fact of the existence of the EAR in their opening statement and in the defendants' defences and counterclaims, because the references to the expression 'Employment Audit Report' therein were merely to categorically assert that the defendants were neither the makers nor the publishers of the EAR, that the defendants did not circulate the EAR, that the EAR was a legally privileged document prepared by Malaysian solicitors for Tiffany & Co, New York and that the EAR was a legally privileged document as confirmed by this honourable court (see para 93).

(5) It was premature for the court to decide this issue at this stage, since the issue concerns the merits of the defendants' defences and counterclaims and could only be decided by the court at the conclusion of the full trial. All the directions for the full trial had been given by the court during pre-trial case management proceedings and they had been duly complied with by the parties. The case was ready to proceed to full trial. The plaintiff was entitled to submit at the conclusion of the full trial that the defendants have failed to discharge their burden of proof on the ground that the EAR was an essential piece of documentary evidence which must be produced by the defendants to prove their pleaded defences and counterclaims against the plaintiff and in the absence of the EAR, the plaintiff's claim must succeed and the defendants' defences and counterclaims must fail (see paras 97 & 99).

(6) The alternative prayer of the plaintiff for the striking out of all references to the EAR in the defendants' defences and counterclaims, had no merit and ought to be dismissed. This was because the power of the court to strike out the references could only be exercised firstly, pursuant to O 18 r 19(1) of the Rules of Court 2012 ('ROC') on the ground that the defendants' defences and counterclaims, as they stand, disclose no reasonable defence, or it is scandalous, frivolous or vexatious; or it may prejudice, embarrass or delay the fair trial of the action; or it is otherwise an abuse of the process of the court and secondly, pursuant to O 92 r 4 of the ROC 2012, in exercise of the inherent jurisdiction of the court to prevent injustice or an abuse of the process of the court (see para 100).

(7) Based on the facts before the court, the court was not satisfied as the

defendants' defences and counterclaims did not disclose a reasonable defence or that they are scandalous, frivolous or vexatious or they may prejudice, embarrass or delay the fair trial of the action or they are otherwise an abuse of the process of the court or that injustice would be caused to the plaintiff if they are not struck out by the court or amended by deleting all references to the EAR therein or all references to the EAR therein (see para 101).

[Bahasa Malaysia summary

Permohonan plaintif adalah untuk memaksa defendan untuk mengemukakan Laporan Audit Pekerjaan ('LAP') untuk perbicaraan penuh atas alasan pengecualian hak istimewa. Secara alternatif, untuk tidak membenarkan defendan daripada membuat apa-apa rujukan kepada LAP dalam penyataan pembelaan mereka ('pembelaan'), dalam dokumen mereka dalam ikatan dokumen bersama ('IDB') dan penyataan-penyataan saksi mereka. Selanjutnya, untuk mengarahkan defendan untuk meminda pembelaan mereka dengan tujuan untuk memotong apa-apa rujukan dalam LAP, yang mana jika tidak, semua rujukan kepada LAP dalam pembelaan hendaklah dibatalkan oleh mahkamah. Dalam menentang dan menghalang pemohonan plaintif, defendan menegaskan, antara lain, bahawa permohonan tersebut adalah tidak jujur dan merupakan penyalahgunaan proses mahkamah. Ini adalah kerana doktrin res judicata, di mana isu sama ada plaintif berhak mendapat LAP itu telah pun dibicarakan dan diputuskan oleh Mahkamah Tinggi apabila mahkamah menolak permohonan plaintif untuk penemuan dokumen-dokumen, lampiran (19), termasuklah LAP itu khususnya dan tidak ada rayuan yang difailkan oleh plaintif terhadap keputusan itu. Defendan juga mendakwa bahawa hak istimewa perundangan profesional dalam LAP ini terletak dengan Tiffany & Co, New York kerana LAP itu, iaitu satu nasihat yang disediakan oleh peguam untuk Tiffany & Co, New York, adalah dokumen undang-undang terlindung dan, oleh itu, s 129 Akta Keterangan 1950 mengehadkan LAP itu daripada dimasukkan ke dalam keterangan dalam perbicaraan penuh kes plaintif terhadap defendan. Selain itu, permohonan ini patut ditolak kerana pengataan dan penegasan plaintif mengenai pengecualian hak istimewa perundangan profesional oleh defendan semata-mata menurut rujukan-rujukan yang telah dibuat defendan kepada LAP dalam pembelaan mereka, dokumen mereka dalam IDB dan dalam kenyataan saksi mereka adalah remeh dan menyusahkan. Isu-isu yang dibangkitkan bagi penentuan mahkamah ini adalah seperti berikut: (i) sama ada defendan boleh dipaksa oleh mahkamah untuk mengemukakan LAP itu bagi maksud perbicaraan penuh tuntutan plaintif terhadap defendan; (ii) sebagai alternatif, sama ada defendan patut dibenarkan daripada membuat apa-apa rujukan kepada LAP dalam pembelaan mereka, dalam dokumen mereka dalam LAP itu dan dalam penyataan-penyataan saksi mereka sendiri; (iii) sama ada defendan boleh dipaksa oleh mahkamah untuk meminda pembelaan mereka untuk memotong semua rujukan kepada LAP di dalamnya;dan (iv) sebagai alternatif, sama ada

semua rujukan kepada LAP dalam pembelaan defendan patut dibatalkan serta-merta oleh mahkamah. A

Diputuskan, menolak permohonan plaintif dengan kos sebanyak RM15,000:

(1) Permohonan plaintif tidak mempunyai merit berdasarkan undang-undang Malaysia. Plaintif telah gagal mengemukakan apa-apa keterangan untuk menunjukkan bahawa Tiffany & Co, New York, pemilik hak istimewa perundangan profesional terlindung dalam LAP, dan bukan defendan, telah mengetepikan hak istimewa perundangan profesional terlindung dalam EAR dengan memberi persetujuan nyata secara bertulis kepada Wong & Partners bagi pendedahan LAP kepada plaintif, dengan itu mewajarkan pendedahannya kepada plaintif dan pengemukaannya di mahkamah bagi maksud perbicaraan penuh tuntutan plaintif terhadap defendan (lihat perenggan 45). B C

(2) Oleh itu, dengan pemakaian undang-undang yang terkandung dalam ss 126–129 Akta Keterangan 1950 kepada fakta tersebut, plaintif berhujah bahawa terdapat penepian oleh defendan berhubung hak istimewa perundangan profesional terlindung dalam LAP telah disalah tanggap secara keseluruhannya kerana defendan-defendan, yang merupakan pihak ketiga untuk penyediaan LAP itu, tidak boleh dikatakan langsung memiliki hak istimewa perundangan profesional dalam LAP apatah lagi untuk mengetepikannya (lihat perenggan 48). D E

(3) Selepas memfailkan penyataan tuntutan ('PT'), plaintif telah berulang kali membuat percubaan tanpa berjaya, untuk memaksa defendan mendedahkan kandungan LAP itu dengan memberikan satu kepada plaintif salinan. Dalam hal ini, menurut doktrin res judicata, plaintif tidak lagi membuka semula isu tersebut sama ada LAP itu ialah suatu dokumen yang dilindungi oleh hak istimewa perundangan profesional kerana ia telah memilih untuk tidak membuat rayuan kepada Mahkamah Rayuan terhadap keputusan Zabariah Yusof hakim yang bijaksana yang telah memutuskan bahawa LAP itu dilindungi oleh hak istimewa perundangan profesional. Oleh itu, plaintif tidak boleh membuka semula isu tersebut sama ada LAP itu dilindungi daripada pendedahan oleh hak istimewa perundangan profesional menurut keputusan tersebut (lihat perenggan 80–82). F G H

(4) Defendan dalam kes ini tidak bergantung kepada kandungan LAP itu untuk membuktikan pembelaan dan tuntutan balas mereka terhadap plaintif. Oleh sebab itu, walaupun defendan-defendan telah membuat rujukan kepada fakta kewujudan LAP itu dalam pembukaan penyataan mereka dan pembelaan dan tuntutan balas defendan-defendan, kerana rujukan kepada ungkapan 'Laporan Audit Pekerjaan' di dalamnya adalah semata-mata untuk menegaskan secara kategori bahawa defendan bukan pembuat mahupun penerbit LAP itu, bahawa defendan tidak I

mengedarkan LAP itu, bahawa LAP itu adalah suatu dokumen hak istimewa perundangan profesional yang disediakan oleh peguam Malaysia untuk Tiffany & Co, New York dan bahawa LAP itu adalah suatu dokumen hak istimewa perundangan profesional sepertimana disahkan oleh mahkamah yang mulia ini (lihat perenggan 93).

(5) Adalah pramatang untuk mahkamah menentukan isu ini pada peringkat ini, kerana isu ini melibatkan merit pembelaan dan tuntutan balas defendan-defendan dan hanya boleh diputuskan oleh mahkamah pada akhir perbicaraan penuh. Semua arahan untuk perbicaraan penuh telah diberikan oleh mahkamah semasa prosiding pengurusan kes pra-perbicaraan dan telah dipatuhi sewajarnya oleh pihak-pihak. Kes itu sedia untuk diteruskan untuk perbicaraan penuh. Plaintif berhak untuk mengemukakan hujah pada akhir perbicaraan penuh itu bahawa defendan telah gagal melepaskan beban bukti mereka atas alasan LAP adalah keterangan dokumentar penting yang hendaklah dikemukakan oleh defendan bagi membuktikan pembelaan dan tuntutan balas yang dipli mereka terhadap plaintif dan tanpa LAP itu, tuntutan plaintif mesti berjaya dan pembelaan dan tuntutan balas defendan hendaklah gagal (lihat perenggan 97 & 99).

(6) Permohonan alternatif plaintif untuk membatalkan semua rujukan kepada LAP dalam pembelaan dan tuntutan balas defendan-defendan, tidak mempunyai merit dan patut ditolak. Ini kerana kuasa mahkamah untuk membatalkan rujukan hanya boleh dilaksanakan pertamanya, menurut A 18 k 19(1) Kaedah-Kaedah Mahkamah 2012 ('KKM') atas alasan bahawa pembelaan dan tuntutan balas defendan-defendan, sepertimana dikemukakan, tidak menunjukkan pembelaan yang munasabah, atau ia adalah mengaibkan, remeh atau menyusahkan; atau ia boleh menjejas, memalu atau melambatkan proses perbicaraan yang adil berhubung tindakan itu; atau selainnya satu penyalahgunaan proses mahkamah dan kedua, menurut A 92 k 4 KKM, dalam menjalankan bidang kuasa yang ada pada mahkamah untuk mengelakkan ketidakadilan atau penyalahgunaan proses mahkamah (lihat perenggan 100).

(7) Berdasarkan fakta di hadapan mahkamah, mahkamah tidak berpuas hati kerana pembelaan dan tuntutan balas defendan tidak menunjukkan pembelaan yang munasabah atau yang tidak mengaibkan, remeh atau menyusahkan atau ia boleh menjejas, memalukan atau melambatkan proses perbicaraan yang adil berhubung tindakan itu atau ia sebaliknya suatu penyalahgunaan proses mahkamah atau ketidakadilan yang akan disebabkan terhadap plaintif jika ia tidak ditolak oleh mahkamah atau dipinda dengan memotong semua rujukan kepada LAP di dalamnya atau semua rujukan kepada LAP di dalamnya (lihat perenggan 101).]

Notes

For a case on discovery of documents, see 2(2) *Mallal's Digest* (4th Ed, 2012 Reissue) para 2994.

For cases on legal professional privilege, see 7(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 2576–2594.

Cases referred to

Black & Decker Inc v Flymo Ltd [1991] 1 WLR 753, Ch D (not folld)

Burnell v British Transport Commission [1956] 1 QB 187, CA (not folld)

Buttes Gas and Oil Co and another v Hammer and another (No 3) [1981] QB 223, HL (not folld)

Dato' Anthony See Teow Guan v See Teow Chuan & Anor [2009] 3 MLJ 14; [2009] 3 CLJ 405, FC (folld)

Great Atlantic Insurance Co v Home Insurance Co and others [1981] 2 All ER 485, CA (not folld)

Joseph Paulus Lantip & others v Unilever plc [2012] 7 CLJ 693, FC (refd)

Sykt Chin Seng Supermarket v United Continental Insurance Sdn Bhd [1997] 5 MLJ 121; [1996] 1 LNS 10, HC (refd)

Westminster Airways Ltd v Kuwait Oil Co Ltd [1951] 1 KB 134, CA (refd)

Legislation referred to

Evidence Act 1950 ss 126, 127, 128, 129

Rules of Court 2012 O 18 r 19(1), (2), O 24 r 12, O 32 rr 1, 2, 13, O 34, O 92 r 4

Rules of the High Court 1980 O 11 r 4(1), O 11 r 4F(1), O 12 r 7, O 18 r 19(1), O 24 rr 12, 13

Rules of the Supreme Court [UK] O 38 r 2A

Matthias Chang Wen Chieh (Cheah Tien Eu and Mohd Akmal Afiq bin Mohamad with him) (Suhaimi Khor Zulkifli & Chang) for the plaintiff.

Chew Kherk Ying (Mohd Arief Emran Bin Ariffin and Jeffri Cheong with him) (Wong & Partners) for the defendant.

Su Geok Yiam J:

BACKGROUND

[1] The background of this case is set out in my previous grounds of judgment dated 28 April 2013.

[2] The plaintiff's application to compel the defendants to produce the Employment Audit Report ('EAR') for the purposes of the full trial on the ground of waiver of privilege or alternatively, to disallow the defendants from

making any reference to the EAR in their statements of defence ('defences'), in their documents in the common bundle of documents ('CBDs') and in their witness statements and to compel the defendants to amend their defences in order to delete all references therein to the EAR failing which all the references to the EAR in the defences must be struck out immediately by the court.

[3] On 18 September 2013, the plaintiff filed an application vide a notice of application bearing the same date, encl 83 (the application), to compel the defendants to produce the EAR for the purposes of the full trial which was scheduled to commence on 20 September 2013 or alternatively, to disallow the defendants from making any reference to the EAR in their defences, CBDs and witness statements and to compel the defendants to amend their defence in order to delete all references therein to the EAR failing which all the references to the EAR in the defences must be struck out immediately by the court.

[4] The application was supported by the plaintiff's affidavit affirmed by the plaintiff on the same date, encl 84 ('AIS').

[5] The plaintiff relied on the following grounds as deposed by the plaintiff in her AIS in order to justify her application:

(a) the defendants have persisted and have continued to refer to the EAR and the purported findings therein as evidenced in the defendants' opening statement dated 9 September 2013, and the witness statements of the second, third and fourth defendants;

(b) the defendants have pleaded the EAR in their defence;

(c) the defendants have, therefore, by their conduct waived whatever privilege that may be attached to the EAR and the EAR must now be subjected to full disclosure, otherwise there is prejudice caused to the plaintiff; and

(d) in the alternative, and/or in the event the defendants maintain that the EAR is privileged, then all the relevant paragraphs, which make references to the EAR and the purported findings in the EAR, in the pleadings filed by the defendants and/or in the witness statements of the second, third and fourth defendants, must be struck out immediately.

THE DEFENDANTS' AFFIDAVIT IN REPLY

[6] The defendants opposed and resisted the plaintiff's application by filing on 19 September 2013, an affidavit in reply, encl 85, affirmed on the same date by the third defendant on behalf of herself and the rest of the defendants.

[7] The defendants relied on the following grounds: A

(a) the application is mischievous and is an abuse of the process of court because of the doctrine of res judicata as the issue whether the plaintiff is entitled to discovery of the EAR has already been litigated and decided by the High Court on 29 November 2010 when the High Court dismissed B the plaintiff's application for discovery of the documents, encl 19, which include the EAR specifically and there was no appeal filed by the plaintiff against that decision;

(b) the legal privilege in the EAR lies with Tiffany & Co, New York because C the EAR being an advice prepared by solicitors for Tiffany & Co, New York is a legally privileged document and, therefore, s 129 of the Evidence Act 1950 bars the EAR from being admitted into evidence during the full trial of the plaintiff's case against the defendants;

D

(c) references to the EAR by the defendants in the documents filed in court for the purposes of the full trial do not constitute a waiver of the legal privilege in the EAR which lies with Tiffany & Co, New York;

(d) unlike the plaintiff who has repeatedly referred to the EAR in her E pleadings and witness statements the references made by the defendant to the EAR in the defendants' witness statements have been sparingly made in order to introduce the background facts of the plaintiff's claim against the defendants and to rebut the allegations made by the plaintiff against the defendants;

F

(e) furthermore, references to the EAR are made to reflect the words uttered in documents that have been agreed to be filed in the CBDs by both parties;

(f) The defendants are entitled to refer to the fact of the existence of the EAR G to rebut the averments made by the plaintiff since the existence of the EAR is not a disputed fact; and

(g) The application should be dismissed as the plaintiff's allegations and averments concerning the waiver of the legal privilege by the defendants H merely by virtue of the references which the defendants have made to the EAR in their defences, their documents in the CBDs and in their witness statements are frivolous and vexatious.

[8] The court noted that the plaintiff has subpoenaed Mr Yiap Tiew Kuang, I one of the directors of the first defendant in her quest to prove her claim against the defendants. The court also noted that the plaintiff has sought to question Mr. Yiap Tiew Kuang on the contents of the EAR. This can be seen in questions 38, 39, 40, 43, 44, 46, 47, 48, 49, 50, 59 and 65 of the list of questions

('LOQs') (exh 'A-4') filed by her in respect of Mr Yiap Tiew Kuang. The LOQs was filed by the plaintiff pursuant to a direction given by this court during case management.

[9] Nevertheless, the defendants have put the plaintiff on notice that they have reserved their right to object to those questions and will submit on their objection to those questions during the full trial in the event that those questions are posed to Mr Yiap Tiew Kuang.

DECISION OF THE COURT

[10] On 20 September 2013, after having heard and considered the oral submissions of both learned counsel for the parties, the court agreed with and accepted the submissions of and the authorities cited by learned counsel for the defendants that the application has no merit and ought to be dismissed with costs.

[11] The court accordingly, dismissed the application and awarded costs of RM15,000 to the defendants including costs thrown away for the day.

[12] The court then adjourned the case to 19 and 20 December 2013 for full trial at 9am.

[13] Being dissatisfied with the dismissal of her application with costs of RM15,000 by the court, the plaintiff has, on 25 September 2013, filed a notice of appeal to the Court of Appeal together with a certificate of urgency.

REASONS FOR THE DECISION OF THE COURT

[14] Below are the reasons why the court decided in that manner:

Four issues for the determination of the court

[15] The court shall deal with the four issues which have arisen for the determination of this court.

The four issues are as follows:

> Issue (1): whether the defendants can be compelled by the court to produce the EAR for the purposes of the full trial of the plaintiffs claim against the defendants or alternatively whether the defendants ought to be disallowed from making any reference to the EAR in their Defences, in their documents in the CBDs and in their witness statements?

Issue (2): whether the defendants can be compelled by the court to amend their defences in order to delete all references to the EAR therein? A

Issue (3): alternatively, whether all references to the EAR in the defendants' defences ought to be struck out immediately by the court?

B

[16] In my judgment, issues (1), (2) and (3) ought to be decided in favour of the defendants.

[17] My reasons are as follows:

The court noted that the applicant did not invoke any Order of the Rules of Court 2012 ('RC 2012') in its application. C

[18] Nevertheless, the court treated the application as an application for discovery and production of documents under O 24 r 12 and 13 of the RC 2012 coupled with an application to amend the defendants' defences and counterclaims or to strike out the references to the EAR in the defendants' defences and counterclaims under O 18 r 19(1) and O 92 r 4 of the RC 2012. D

[19] Order 24 rr 12 and 13 of the RC 2012 are substantially similar to O 24 r 12 and 13 of the Rules of the High Court 1980 ('RHC 1980'). The two provisions in the RC 2012 read as follows: E

Order for production to Court (O 24, r 12)

12 (1) At any stage of the proceedings in any cause or matter the Court may, subject to rule 13(1), order any party to produce to the Court any document in his possession, custody or power relating to any matter in question in the cause or matter that falls within one of the following descriptions: F

(a) documents on which the party relies or will rely;

(b) documents which could —

G

(i) adversely affect a party's case; or

(ii) support a party's case; and

(c) documents which may lead to a series of inquiry resulting in the obtaining of information which may—

H

(i) adversely affect a party's case; or

(ii) support a party's case.

(2) The Court may deal with the documents when produced in pursuance of an order made under paragraph (1) in such manner as it thinks fit.

I

Production to be ordered only if necessary (O 24, r 13)

13 (1) An order for the production of any documents for inspection or to the Court shall not be made under any of the foregoing rules unless the Court is of the opinion that the order is necessary either for disposing fairly of the cause or matter or for saving costs.

(2) Where on an application under this Order for production of any document for inspection or to the Court, privilege from such production is claimed or objection is made to such production on any other ground, the Court may inspect the document for the purpose of deciding whether the claim or objection is valid.

[20] The two provisions in the RHC 1980 read as follows:

12 Order for production to Court (O 24, r 12)

At any stage of the proceedings in any cause or matter the Court may, subject to rule 13 (1), order any party to produce to the Court any document in his possession, custody or power relating to any matter in question in the cause or matter and the Court may deal with the document when produced in such manner as it thinks fit.

13 Production to be ordered only if necessary, etc (O 24, r 13)

(1) No order for the production of any documents for inspection or to the Court shall be made under any of the foregoing rules unless the Court is of opinion that the order is necessary either for disposing fairly of the cause or matter or for saving costs.

(2) Where on an application under this Order for production of any document for inspection or to the Court privilege from such production is claimed or objection is made to such production on any ground, the Court may inspect the document for the purpose of deciding whether the claim or objection is valid.

[21] The effect of these two provisions in the RC 2012 and in the RHC 1980, is to give power and discretion to the court to order any party to produce documents and, in the event, privilege from such production is claimed or there is an objection to their production on any ground, the court may inspect the documents for the purpose of deciding whether the claim or objection is valid.

[22] It was held in *Westminster Airways Ltd v Kuwait Oil Co Ltd* [1951] 1 KB 134 (CA)(refd) by the English Court of Appeal that if prima facie, based on the affidavit evidence, the claim to privilege was justified the court would not look at the document, in respect of which the claim to privilege was claimed, in order to determine whether the document was protected by privilege.

[23] Jenkins LJ who agreed with the judgment of Singleton LJ said as follows at pp 145–146:

The claim for further discovery, as developed in argument before us, was not to the effect that the claim to privilege was wholly bad on the face of it, with the result that the whole of the documents to which that claim related should be disclosed, but was argued on the lines that here was a dubious claim to privilege which might, or might not, be justified, and that the proper course, in the circumstances, was for the court itself to inspect the documents and decide how far, if at all, they were privileged documents.

It is not open to doubt that under the R. S. C, Ord. 31, r 19A (2), the court has power, in a proper case, to inspect documents where a claim of privilege is set up against a claim for inspection of documents by the opposite party. *Birmingham and Midland Omnibus Company Lt v London and North Western Ry Co 926*) affords an illustration of a case in which the court did take that course, and, as it happened, having done so, held that the claim to privilege was well founded. But there is nothing in the rule, or in the authorities, to constrain the court to hold that, in every case where a claim to privilege is made and disputed, the party seeking production is entitled to come to the court and (as it were) demand as of right that the court should go behind the oath of the opposite party and itself inspect the documents. *The question whether the court should inspect the documents is one which is a matter for the discretion of the court, and primarily for the judge of first instance. Each case must depend on its own circumstances; but if, looking at the affidavit, the court finds that the claim to privilege is formally correct, and that the documents in respect of which it is made are sufficiently identified and are such that, prima facie, the claim to privilege would appear to be properly made in respect of them, then, in my judgment, the court should, generally speaking, accept the affidavit as sufficiently justifying the claim without going further and inspecting the documents.*

Considering this matter from that point of view, I find that the documents in respect of which privilege is claimed are communications passing between the defendant company and their insurance brokers and insurers with respect to the accident which gave rise to the claim in the action, and that the claim to privilege in respect of those communications is made in the usual and regular form.

In my judgment, prima facie those documents are of a character in respect of which the claim to privilege is justified. The insurers, after all, are concerned in the matter only because they have agreed by the contract of insurance to indemnify their assured against claims of the character in question. That is how they come into it. That being so, the very fact that the insurance company are communicated with at all indicates that a claim is anticipated. Moreover, in the present case the circumstances were such that there could be no doubt, even before a formal claim was lodged, that a claim would ensue. Prima facie, in such circumstances a communication between the assured and the insurance company, whether direct or through the assured's brokers, would be directed to the question whether the claim should be disputed or admitted, and if it was to be disputed, how best to conduct the defence.

(Emphasis added.)

[24] Reverting to the instant case, in my judgment, there was no necessity for this court to inspect the EAR because it was clear to the court based on the evidence of the defendants which was contained in the affidavit in reply of the third defendant and the averments of the defendants in their defences, that the document in respect of which discovery and production was sought by the plaintiff and in respect of which the defendants have claimed legal professional privilege is an employment audit report prepared by the Malaysian solicitors, namely, Wong & Partners, for their client, namely, Tiffany & Co in New York.

[25] Now what is the law in Malaysia governing legal professional privilege in documents prepared by solicitors upon the instructions of their clients?

[26] The answer to this question lies in ss 126, 127, 128 and 129 of the Evidence Act 1950.

The four sections in the Evidence Act read as follows:

126 Professional communications.

(1) No advocate shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such advocate by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment:

Provided that nothing in this section shall protect from disclosure—

(a) Any such communication made in furtherance of any illegal purpose;

(b) Any fact observed by any advocate in the course of his employment as such showing that any crime or fraud has been committed since the commencement of his employment.

(2) It is immaterial whether the attention of the advocate was or was not directed to the fact by or on behalf of his client.

Explanation - the obligation stated in this section continues after the employment has ceased.

ILLUSTRATIONS

(a) A, a client, says to B, an advocate: 'I have committed forgery and I wish you to defence me.'

As the defence of a man known to be guilty is not a criminal purpose this communication from disclosure.

(b) A, a client, says to B, and advocate: 'I wish to obtain possession of property by the use of a forged deed on which I request you to sue.'

This communication being made in furtherance of a criminal purpose is not protected from disclosure.

(c) A, being charged with embezzlement, retains B, and advocate, to defend him. In the course of the proceedings B observes that an entry has been made in A's account-book, charging A with the sum said to have been embezzled, which entry was not in the book at the commencement of his employment.

This being a fact observed by B in the course of his employment, showing that a fraud has been committed since the commencement of the proceedings, it is not protected from disclosure.

127 Section 126 to apply to interpreters, etc

Section 126 shall apply to interpreters and the clerks or servants of advocates.

128 Privilege not waived by volunteering evidence.

If any party to a suit gives evidence therein at his own instance or otherwise, he shall not be deemed to have consented thereby to such disclosure as is mentioned in section 126; and if any party to a suit or proceeding calls any such advocate as a witness, he shall be deemed to have consented to the disclosure, only if he questions the advocate on matters which but for such question he would not be at liberty to disclose.

129 Confidential communications with legal advisers.

No one shall be compelled to disclose to the court any confidential communication which has taken place between him and his legal professional adviser unless he offers himself as a witness, in which case he may be compelled to disclose any such communications as may appear to the court necessary to be known in order to explain any evidence which he has given, but no others.

[27] In *Sykt Chin Seng Supermarket v United Continental Insurance Sdn Bhd* [1997] 5 MLJ 121; [1996] 1 LNS 10, the plaintiff applied for discovery and production of an adjuster's report under O 24 r 12 and 13 of the RCH 1980 vide a summons in chambers in the course of the trial of the plaintiff's claim for loss and damage to his stock-in-trade in its premises arising from a flood against the defendant who was the insurer.

[28] The defendant's learned counsel objected to its production on the ground of privilege and on the ground of prejudice to the defence if the report was produced. Nik Hashim bin Nik AB Rahman JC (later JCA and FCJ) rejected the objection on both the grounds.

[29] With regard to the ground of privilege, learned judge held that the only relevant provision in our Evidence Act 1950 which governs professional privilege is s 126, that the privilege is strictly confined to legal communications of solicitor and client relationship and that any disclosure must be with the absolute consent of the client and that the privilege does not protect professional disclosures made to clergymen or doctors. This is what learned judge said:

The only relevant provision in our Evidence Act 1950 (the 'Act') governing professional privilege is section 126. The privilege is strictly limited to legal communications of solicitor and client relationship. Any disclosure, if it is to take place, must be with the absolute consent of the client (see *Chua Su Yin & Co v Ng Sung Yee* [1991] 2 MLJ 348), as privilege is that of a client (per Eusoff Chin J (as he then was)) in *Dato' Au Ba Chai and Ors v Koh Keng Kheng and Ors* [1989] 3 MLJ 445

at 447). With regard to the scope and the limitation of the privilege, Ong CJ (Malaya) in *PP v Haji Kassim* [1971] 2 MLJ 115; [1971] 1 LNS 109 (FC) said at p 116:

> 'The only relevant provision in our Evidence Ordinance excluding professional confidences is s 126, which states that no advocate and solicitor shall at any time be permitted, unless with his client's express consent, to disclose any communications made to him and in the course of his employment as such. This rule is founded on the principle that the conduct of legal business without professional assistance is impossible and on the necessity, in order to render such assistance effectual, of securing full and unreserved intercourse between the two. This privilege does not protect professional disclosures made to clergymen or doctors. See *Phipson on Evidence*, (10th Ed), para 587 and commentaries in Sarkaron s 126 of the Indian Evidence Act.'

[30] On the ground of prejudice, learned judge held that it was irrelevant and speculative for the purpose of discovery and production because the report was relevant and vital for disposing fairly of the plaintiff's claim, and probably relevant to the defence as well ie to prove or disprove the plaintiff's claim, and it was left to the trial judge to give whatever weight to the evidence in the report.

[31] In *Dato' Anthony See Teow Guan v See Teow Chuan & Anor* [2009] 3 MLJ 14; [2009] 3 CLJ 405, the Federal Court applied s 126 of the Evidence Act 1950 to a legal opinion which was prepared by a solicitor for a client, a public listed company, Kian Joo Can Factory Bhd ('KJCF') and held that it was protected by legal professional privilege.

[32] In that case, the first respondent was the managing director of KJCF and the second respondent was its executive director and factory manager. The appellant and the financial controller of KJCF ('Alice') gave instructions and furnished information to KJCF's advocate ('PW1'). This caused PW1 to render a legal opinion which was addressed to KJCF, for the attention of the appellant and Alice.

[33] The legal opinion contained various allegations defamatory of the respondents that had been communicated to her by the appellant and Alice. The respondents, who were also given a copy of the legal opinion by the external auditors of KJCF, commenced an action for defamation against the appellant.

[34] At the trial, the respondents called PW1 as their first witness and sought

to admit the legal opinion. PW1 claimed that she was unable to answer any questions on the legal opinion by reason of privilege under s 126 of the Evidence Act 1950.

[35] The learned High Court judge decided in her favour after a trial within a trial.

[36] Nevertheless, the decision was reversed by the Court of Appeal on the respondents' appeal by reason of the inapplicability of the protection contained in s 126 of the Evidence Act 1950 due to the waiver of confidentiality and the privilege attached to the legal opinion on the appellant's part.

[37] The appellant succeeded in his appeal to the Federal Court. Nik Hashim FCJ in delivering the judgment of the Federal Court held as follows at pp 15–16 (MLJ); p 406 (CLJ) under 'Held':

> (1) The Court of Appeal, in taking the 'loss of confidentiality' approach to determine loss of privilege, had failed to recognise the common law maxim 'once privileged, always privileged' as being embodied in ss 126 to 129 of the Act. Similarly, the Court of Appeal's finding that 'confidentiality is a characteristic that can be lost' with a corresponding loss of privilege did not accord with the clear and imperative terms of s 126 of the Act which makes no such reference, either expressly or by implication, to such a contention. It is true that a legal opinion sought is implicitly confidential but the exception under s 126 of the Act has nothing to do with loss of confidentiality elsewhere but with whether the privilege holder ie, the client is prepared to waive the privilege for the court proceedings. It is the privilege that has to be waived and not the confidentiality. Thus, the finding of the Court of Appeal in treating 'privilege' as being co-extensive with 'confidentiality' was untenable. Hence, the legal professional privilege under s 126 of the Act was absolute and it remained so until waived by the client. *Dato' Au Ba Chi v Koh Keng Kheng* (foll); *Emperor v Mariane G Rodrigues* (dist). (paras 20, 21, 22, 23, 24 & 25)
>
> (2) Section 126 of the Act permits only one exception when the privilege no longer applies ie, upon the express consent of the client given and directed to the advocate who is called to court to disclose the professional communication made to him by his client or the advice given by the advocate. Thus, the term 'express consent' in s 126 of the Act imports the requirement that there must be an intentional and deliberate act to waive the legal privilege by the client. Since the privilege holder was KJCF, it was for KJCF to waive it and convey the consent to the advocate when called to give evidence. There was, on the facts, no such express consent on the part of KJCF to PW1. In this instance, it was PW1 who claimed that she was unable to disclose the legal opinion by reason of privilege under s 126 of the Act. The appellant, acting on behalf of KJCF, was duty-bound to support the privilege accorded to KJCF. Thus, the real issue before the court was whether or not the refusal by PW1 to disclose the legal opinion on the ground of privilege was correct. The question of legal professional privilege being raised by the appellant in the defamation proceedings as a defence to the respondents' claim could not be in issue. So, on the facts of this case, the High Court's decision disallowing disclosure of the

legal opinion through PW1 on the grounds of privilege and non-availability of express consent by KJCF to the witness to waive the privilege was correct. *Dato' Au Ba Chi v Koh Keng Kheng* (foll), (paras 31, 35 & 39)

(3) The Court of Appeal had failed to appreciate that the privilege holder was a corporation and that KJCF, as an artificial entity, had to function through its human agencies, which usually would be its principal officials whether they were the directors, the top management personnel or its professional advisers. Thus, both the respondents and the appellant, as directors of KJCF, would be entitled to see and have custody of any legal opinion obtained by KJCF. The Court of Appeal was also erroneous in classifying the two external auditors of KJCF from Ernst & Young as 'third parties' since they, as auditors, were required by law to oversee the management of the finances of KJCF. They would have to be informed of any financial mismanagement within KJCF and were entitled to both enquire into and pursue such allegations. Thus, the persons concerned to whom disclosure was made were not 'third parties' or outsiders for the purpose of legal professional privilege. Furthermore, the Court of Appeal's finding that privilege was lost or could not be claimed because the legal opinion was already in the hands of the opposite party was unsustainable, (paras 42, 44, 46 & 49)

(4) Although the appellant had placed the legal opinion under Part 1 of Schedule 1 in the List of Documents, he had raised specific objection to production of the legal opinion on the ground of legal privilege under para 2 in the List of Documents. This was sufficient as it complied with O 24 r 5(2) of the RHC. Thus, the mere placement of the privileged document in Part 1 was not fatal and did not amount to waiver of privilege. Therefore, the Court of Appeal's finding that the appellant 'expressly consented' to production of the legal opinion was unwarranted since such finding disregarded the specific objection taken by the appellant in his List of Documents. Further, the Court of Appeal failed to appreciate that O 24 of the RHC merely provided a right of inspection of documents disclosed in the List of Documents and, thus, could not be taken as overriding the substantive legal provisions governing legal professional privilege contained in s 126(1) of the Act. (paras 54 & 55)

(5) The decision of the High Court judge that PW1 could not be compelled to disclose the communication she had received from the appellant and to produce the legal opinion at the trial was therefore correct. The communication and the legal opinion were inadmissible.

[38] At pp 24–25 (MLJ); pp 417–418 (CLJ) the learned judge said as follows:

[14] In *R v Derby Magistrates' Court, ex-parte B* [1995] 4 All ER, Lord Taylor CJ, speaking in the House of Lords, said at p 540:

The principle which runs through all these cases, and the many other cases which were cited, is that a man must be able to consult his lawyer in confidence, since otherwise he might hold back half the truth. The client must be sure that what he tells his lawyer in confidence will never be revealed without his consent. Legal professional privilege is thus much more than an ordinary rule of evidence, limited

in its application to the facts of a particular case. It is a fundamental condition on which the administration of justice as a whole rests.

[15] In endorsing the above passage in the Privy Council case of *B v Auckland District Law Society* [2003] 2 AC 736, Lord Millet said at p 756 paras 44–45:

Some principles are well established and were confirmed by Lord Taylor CJ in *R v Derby Magistrates' Court, Ex p B* [1996] AC 487, 503 G-H. First, the privilege remains after the occasion for it has passed: unless waived 'once privileged, always privileged'. Secondly, the privilege is the same whether the documents are sought for the purpose of civil or criminal proceedings and whether by the prosecution or the defence. Thirdly, the refusal of the claimant to waive his privilege for any reason or none cannot be questioned or investigated by the court. Fourthly, save in cases where the privileged communication is itself the means of carrying out a fraud, the privilege is absolute. Once the privilege is established, the lawyer's mouth is 'shut for ever': see *Wilson v Rastall* [1792] 4 Durn & E 753 759, per Buller J. The society has not alleged that any of the documents fall within the excepted category, but if any of them does it retains the right to make such a claim hereafter.

It is, of course, well established that the privilege belongs to the client and not to his lawyer, and that it may not be waived by the lawyer without his client's consent. But the privilege is available to the client whether he is a layman or a lawyer; even a lawyer - perhaps especially a lawyer - has need of the services of another lawyer if he becomes personally embroiled in legal proceedings.

[39] At pp 25–26 (MLJ); pp 418–419 (CLJ) the learned judge continued to say as follows:

[16] In the *Three Rivers DC v Bank of England* [2005] 1 AC 610 Lord Scott of Foscote said at p 647:

… Why is it that the law has afforded this special privilege to communications between lawyers and their clients that it has denied to all other confidential communications? In relation to all other confidential communications, whether between doctor and patient, accountant and client, husband and wife, parent and child, priest and penitent, the common law recognises the confidentiality of the communication, will protect the confidentiality up to a point, but declines to allow the communication the absolute protection allowed to communications between lawyer and client giving or seeking legal advice.

[17] With the above principles in mind, I now proceed to answer the questions posed.

Questions (1) And (2): Privilege And Confidentiality

[18] These two questions arose as a result of the findings of the Court of Appeal which held that the High Court was erroneous to hold that once the legal opinion was privileged, it would remain so forever, even if it was published to third parties.

A The Court of Appeal further ruled that confidentiality is an essential requirement in s 126 (see para 33 of the judgment), and found on the facts of this case that the communication by the appellant to the advocate was not intended to be confidential (see para 34-49) and therefore the privilege under s 126 does not apply (see para 32) and cited *Emperor v Mariane G Rodrigues* [1903] 5 Bombay LR 122 in support.

B …

[20] With respect, I do not agree. I agree with the appellant that the Court of Appeal, in taking the 'loss of confidentiality' approach to determine loss of privilege, had failed to recognise the common law maxim 'once privileged, always privileged' (see per Cockburn, CJ in *Bullock & Co v Corry & Co* [1878] 3 QBD 356 at p 358)
C as being embodied in ss 126 to 129 of the Act. This common law maxim has been endorsed and approved by the high authority of the House of Lords and Privy Council in the cases quoted earlier where the privilege was accepted as being absolute. The maxim has hitherto been followed in Malaysia as seen in the High Court case of *Dato' Au Ba Chi & Ors v Koh Keng Kheng & Ors* [1989] 3 MLJ 445;
D [1988] 1 LNS 188, which was adopted by learned trial judge in the present case. Relying on the wording of s 126 of the Act, Eusoff Chin J (as he then was) in Dato' Au Ba's case held the maxim 'once privileged always privileged' applied. The court said at p 447:

E Section 126 also says that the legal adviser shall not be permitted at any time to disclose professional communications. It is said that a communication once privileged is 'always privileged' (per Cockburn CJ in *Bullock v Corry & Co*).

[21] It may be noted that *Dato' Au Ba*'s case went on appeal to the then Supreme Court and the High Court's decision was upheld but unfortunately there was no
F written judgment of the Supreme Court. Hence, the importance of this decision.

[40] At pp 26–27 (MLJ); p 420 (CLJ) the learned judge continued to say as follows:

G [22] The case of Emperor, relied upon by the respondents, is easily distinguishable. That case deals with a communication from a client to a solicitor for the purpose of communicating to a third party, the complainant (not the client). The solicitor had the client's instructions to make to the complainant the statements communicated by the client to the solicitor. So there was nothing of a confidential nature in the
H communication. Whereas our case concerns legal advice or communications made to an advocate with a view of obtaining legal advice, which would necessarily be privileged. Therefore, reliance on Emperor by the Court of Appeal is misconceived.

[23] Similarly, the Court of Appeal's finding at p 311 that 'confidentiality is a characteristic that can be lost' with a corresponding loss of privilege does not accord
I with the clear imperative terms of s 126 which makes no such reference, either expressly or by implication, to such a contention.

[24] It is true that a legal opinion sought is implicitly confidential but the exception under s 126 has nothing to do with loss of confidentiality elsewhere but with whether the privilege holder ie, the client is prepared to waive the privilege for the

court proceedings. It is the privilege that has to be waived and not the confidentiality. Thus, the finding of the Court of Appeal in treating 'privilege' as being co-extensive with 'confidentiality' is untenable.

[25] Hence, I hold that the legal professional privilege under s 126 of the Act is absolute and it remains so until waived by the privilege holder, ie the client.

[26] Accordingly, my answer to Question (1) is in the affirmative while my answer to Question (2) is in the negative.

Questions (3), (4) And (5): Waiver And Express Consent

[27] The questions here concern the meaning and scope of the words 'express consent' in s 126 of the Act.

…

[41] At pp 28–30 (MLJ); pp 421–422 (CLJ) the learned judge continued to say as follows:

[30] It must be noted that s 126 of the Act was enacted to give protection to legal communications and legal advice between the advocate and his client from disclosure. The section uses strong language in imposing the prohibition. No advocate 'shall at any time be permitted' to disclose such communication 'unless with his client's express consent'. By its terms, the section is quite straightforward. As such, the Court of Appeal had no choice but to give effect to the plain meaning of the words used in s 126 of the Act rather than seek to expand or modify the statutory provisions by way of reference to common law principles. McDougall J, in delivering the judgment of the Court of Appeal of New South Wales in *Sugden v Sugden* [2007] NSWCA 312, said at para 34:

… the availability of client legal privilege was to be decided in accordance with the relevant provisions of the Evidence Act.

Hence, the various authorities and tests on the common law principles of waiver or acquiescence relied on by the respondents and adopted by the Court of Appeal cannot be taken to apply in the face of the specific and singular statutory exception which is clearly set out in the section.

[31] In the instant case, s 126 of the Act permits only one exception when privilege no longer applies ie, upon the express consent of the client given and directed to the advocate who is called to court to disclose the professional communication made to him by his client or the advice given by the advocate. The case of *Dato' Au Ba*, supra, makes that clear at p 447:

… since the law requires the defendants must first give their express consent to their solicitors before the document could be released to anyone. Such consent could have been endorsed in the document itself, or given separately in writing to the effect that they consented to the document being released to the first plaintiff (Emphasis added).

Thus, the term 'express consent' in s 126 imports the requirement that there must be an intentional and deliberate act to waive the legal privilege by the privilege holder, ie, the client.

[32] The need for the client's express consent before the privilege can be waived is the same in Singapore. In *Yeo Ah Tee v Lee Chuan Meow* [1962] MLJ 413; [1962] 1 LNS 210, the Singapore Court of Appeal held that the privilege attaching to a statement supposedly made by the client to the Legal Aid Bureau, the client's solicitors, which the client denied making, was not expressly waived by the client's saying that he would not object to the statement being produced if he made it. Buttrose J, speaking for the court, said:

… I am unable to construe it as an express waiver by the plaintiff of the privilege and indeed, in my view, it falls short of that express consent of the client which is required before any such disclosure can be made. His counsel objected strongly to the evidence and claimed privilege throughout.

[33] So also is the position in India. In *Mandesan v State of Kerala* [1995] Cri LJ 61, the notion that in the absence of 'express consent' there could be loss of privilege by a failure to object or by waiver or acquiescence on the part of the client was advocated. In that case the advocate had already given evidence of the communication between him and the client and no objection had been raised on the part of the client but the High Court ruled that such communication was inadmissible under s 126. Thomas J said at p 62:

… But failure to raise objection would not remove the lid of confidentiality attached to such communication between the advocate and his client. *The privilege embodied in* Section 126 of the Evidence Act *is not liable to melt down on the principle of waiver or acquiescence. This can be more understood from Section 128 of the Act which says that by giving evidence, a party shall not be deemed to have consented to such disclosure as is mentioned in Section 126. It is only when the party calls such advocate as a witness that the party shall be deemed to have consented to such disclosure, that too only if he questions the witness about it. Section 126 uses strong language in imposing the prohibition. No advocate 'shall at any time be permitted' to disclose such communication 'unless with his client's express consent'. A failure on the part of the client to claim privilege cannot be stretched to the extent of amounting to 'express consent' envisaged in the provision* (*Bhagwani v Decoram,* AIR 1933 Sind 47).

[34] Thus, the common law rule of waiver by implication or imputation is not recognized by the cases under either the Malaysian, Singapore or Indian Evidence Act.

[35] It was common ground that the client was the company KJCF and not the directors. Since KJCF was the client of the advocate, the privilege holder was KJCF and not the advocate (see *Minter v Priest* [1930] AC 558 at p 579) of the individual directors. It is for KJCF whether to waive it and convey the consent to the advocate when called to give evidence. Augustine Paul J (now FCJ) in *Public Prosecutor v Dato' Seri Anwar Ibrahim (No 3)* [1999] 2 MLJ 1; [1999] 2 CLJ 215 observed at p 179 (MLJ); p 408 (CLJ):

As the privilege is that of the client, he may expressly waive it under s 126 or impliedly under s 128 of the Evidence Act 1950 by calling the advocate as his witness. A

[42] At pp 30–31 (MLJ); 424–425 (CLJ) the learned judge continued to say as follows: B

Since the trial judge found that no such consent was given, the notation of the words 'Alice' 'Tunku' dated 14 November and the initialling on the legal opinion by the appellant and his subsequently publishing it to other persons hardly constitute express consent on the part of KJCF to its advocate, PW1. At most, the notation was an internal communication within KJCF. C

[36] The disclosure of the legal opinion by the respondents would not remove the privilege attached to the legal opinion.

[37] Under s 126 of the Act the position is as stated in *Dato' Au Ba*'s case which was a case where the communication by the letters between client and advocate had been originally included by mistake in the agreed bundle of documents. There was therefore disclosure to the opposite party. But the High Court allowed the document to be removed or expunged from the agreed bundle on the ground of legal privilege. The earlier disclosure was held not to be a disqualifying ground. D E

[38] The Indian decision of Daya Shanker Dubey, relied on by the respondents seems to rest on the peculiar facts of that case and the legal proposition itself is inconsistent with the decision in the above cases.

[39] In the present case, it is KJCF's advocate, PW1, who claimed that she was unable to disclose the legal opinion by reason of privilege under s 126 of the Act. The appellant, acting on behalf of KJCF, was duty bound to support the privilege accorded to KJCF. Thus, the real issue before the court was whether or not the refusal by the advocate PW1 to disclose the legal opinion on the ground of privilege was correct. The question of legal professional privilege being raised by the appellant in the defamation proceedings as a defence to the respondents' claim cannot be in issue. So, on the facts of this case, the High Court's decision disallowing disclosure of the legal opinion through PW1 on the grounds of privilege and non-availability of express consent by KJCF to the witness to waive the privilege is correct. learned judge said: F G

The client has every right to object since the opening phrase of this particular section reads: 'No advocate shall be permitted …' Thus unless express consent in writing by client is given to PW1 the legal opinion cannot be disclosed through her. H

[40] Hence my answers to Questions (3) and (4) are in the affirmative while my answer to Question (5) is in the negative. I

[43] All the above authorities have been cited by Mr Mohd Arief Emran bin Ariffin, learned counsel for the defendants, in support of his submissions that the plaintiffs application is devoid of any merit as the law in Malaysia is

different from that in England ie the only person who can waive the legal professional privilege in a document is the client who is the owner of it and the waiver must be by the express consent of the client pursuant to s 126 of the Evidence Act 1950 or by implied consent by the client by calling the solicitor or advocate who had prepared the legal opinion as a witness pursuant to s 128 of the Evidence Act 1950. In Malaysia, Singapore or India, the common law rule of waiver by implication or imputation is not recognised in the respective Evidence Acts of the three countries.

[44] Having read and understood the grounds of judgment of the Federal Court in *Dato' Anthony See Teow Guan v See Teow Chuan & Anor*, this court agreed with and accepted the submissions of the defendants.

[45] In my judgment, the plaintiff's application had no merit based on the Malaysian law. The court was satisfied that the plaintiff had failed to adduce any evidence to demonstrate to this court that Tiffany & Co, New York, the owner of the legal professional privilege in the EAR, and not the defendants, has waived its legal professional privilege in the EAR by giving its express consent in writing to Mr Mohd Arief Emran bin Ariffin of Wong & Partners for the disclosure of the EAR to the plaintiff, thereby justifying its disclosure to the plaintiff and its production in the court for the purposes of the full trial of the plaintiff's claim against the defendants.

[46] It is crystal clear in the instant case, that Tiffany & Co, New York is not a party to the plaintiffs claim. Apart from that, Tiffany & Co, New York has not offered any of its directors, its top management personnel or its professional advisers as witnesses in the instant case to testify for and on behalf of the plaintiff or any of the defendants.

[47] In addition, Tiffany & Co, New York has also not offered any of its solicitors from the legal firm of Wong & Partners who were responsible for preparing the EAR as a witness for the plaintiff or any of the defendants with its express or implied consent that the solicitor concerned may be questioned by the plaintiff or any of the defendants on the contents of the EAR during the full trial or with its express consent in writing to produce and tender the EAR as a piece of documentary evidence during the full trial either to prove or disprove the plaintiff's claim or to prove or disprove the defendants' defences and counterclaims.

[48] Therefore, upon applying the Malaysian law as contained in ss 126 to 129 of the Evidence Act 1950 to the facts before the court, the plaintiff's contention that there has been a waiver by the defendants of the legal professional privilege in the EAR is wholly misconceived because the

defendants, who are third parties to the preparation of the EAR, could not by any stretch of the imagination be said to own the legal professional privilege in the EAR let alone waive it.

[49] Be that as it may, with regard to the plaintiff's contention that the defendants' defences have no merit and will definitely fail and therefore ought to be struck out because the EAR has not been included as a document in the CBDs, the court was of the view that the plaintiff is entitled to make that submission at the conclusion of the full trial and that it was premature for this court to decide the issue at this stage.

[50] It was also clear to this court that it is the plaintiff who wishes to obtain discovery of the EAR and to compel the defendants to make disclosure of the EAR to the plaintiff in order to enable the plaintiff to prove its claim against the defendants and not the other way around.

[51] The defendants, on the other hand, have consistently maintained that they are not relying on the contents of the EAR to disprove the plaintiff's claim or to prove their defences and counterclaims against the plaintiff.

[52] The court was of the respectful view that the four English cases cited by the plaintiff, namely, *Great Atlantic Insurance Co v Home Insurance Co and others* [1981] 2 All ER 485; *Buttes Gas and Oil Co and another v Hammer and Another (No 3)* [1981] QB 223; *Black & Decker Inc v Flymo Ltd* [1991] 1 WLR 753; and *Burnell v British Transport Commission* [1956] 1 QB 187 (the 'four English cases'), are not applicable in Malaysia by virtue of the express provisions of ss 126, 127, 128 and 129 of the Evidence Act 1950 and the Malaysian authority of *Dato' Anthony See Teow Guan v See Teow Chuan & Anor*.

[53] The court also noted that in *Great Atlantic Insurance Co v Home Insurance Co & others*, the first English case cited by Mr Mathias Chang, the privilege in the document concerned belonged to the plaintiff and not a third party, unlike the facts of the instant case.

[54] In that case, as the plaintiff had itself disclosed two paragraphs in the document which was protected by privilege from disclosure, the English Court of Appeal held that there was a waiver of the privilege in the document by the plaintiff.

[55] This much is clear from the following excerpt in that case under 'held':

> (2) However, the introduction by the plaintiffs of part of the memorandum into the trial record waived privilege in regard to the whole document, since a party was not entitled to disclose only those parts of a document that were to his advantage, and

both the court and the opposing party were entitled to know whether the material released from privilege represented the whole of the material relevant to the issue in question. The fact that the waiver had been made by the plaintiffs' counsel without the plaintiffs agreeing to it was irrelevant, since counsel had ostensible authority to bind the plaintiffs in any matter arising in, or incidental to, the litigation, and when counsel introduced into the record part of the document he thereby effectively waived any privilege attaching to the document that could be asserted by the plaintiffs. The whole of the memorandum was therefore required to be disclosed, and the plaintiffs' appeal would be dismissed (see p 492j and p 494a and hj, post): *Matthews v Munster* [1886-90] AELR Rep 251, *Goldstone v Williams, Deacon & Co* [1899] 1 Ch 47, dictum of Denning LJ in *Griffiths v Evans* [1953] 2 All ER at 1371 and *Burnell v British Transport Commission* [1955] 3 All ER 822 applied.

Decision of McNeill J affirmed on different grounds.

[56] This court noted that in *Buttes Gas and Oil Co and another v Hammer and Another (No 3)* [1981] QB 223, the second English case cited by Mr Mathias Chang, where the legal issue revolved around legal professional privilege, the English Court of Appeal had held, inter alia, as follows under 'Held':

(2) That though legal professional privilege could be destroyed by sufficient evidence of fraud, the allegations of fraud in the instant case were not sufficiently made out to destroy that privilege (post, pp 246G, 252B-D, 266E).

(3) That the extent to which legal professional privilege was waived by reason of references in the pleadings to withheld documents was a question of degree; and that the parties should re-examine all the documents in the light of the principles stated by the court (post, pp 246E-F, 252E-F, 268B-D) …

(ii) The courts should recognize as privileged information exchanged between a party to litigation and third persons with a common interest and legal advisers in common relating to pending litigation (post, pp 243A-F, 251G-252A, 267H-268A).

[57] At p 252, Donaldson LJ said as follows:

On waiver McNeill J held that reference in the pleadings to a document or to its contents does not of itself waive any privilege which attaches to it. It must be right that a bare reference to a document in a pleading does not waive any privilege attaching to it as otherwise there would be no scope for taking objection under R.S.C., O. 24 r 11 (i), when a notice was served under rule 10 (1). If, on the other hand, a document is reproduced in full in the pleading, its confidentiality is gone and no question of privilege could arise. Where the line is drawn between these two extremes may be a matter of some nicety, but I do not think that it is necessary to reach a conclusion in the present case which does not, in my judgment, turn on so narrow an issue as waiver in relation to the few documents which are referred to in the pleadings.

I now turn to what I regard as the decisive issue in the case, namely, public interest immunity from disclosure.

[58] I am of the respectful view that by virtue of the decision of the Federal Court of Malaysia in *Dato' Anthony See Teow Guan v See Teow Chuan & Anor*, the above decision cannot be applied to the facts of the instant case unless there is evidence to show that the EAR is itself the means of carrying out a fraud but there was none shown to the court. Hence, the privilege of Tiffany & Co, New York, in the EAR is absolute. Be that as it may, the references which were made to the EAR by the defendants in the three types of documents, in respect of which the plaintiff has taken objection to, were sparingly made.

[59] This court noted that the legal issue in *Black & Decker Inc v Flymo Ltd* [1991] 1 WLR 753, which is the third English case cited by Mr Mathias Chang, does not concern legal professional privilege. Apart from that the facts are also clearly distinguishable from the facts in the instant case.

[60] In that case, the documents which were the subject of an application for specific discovery were the witness statement of a plaintiffs witness and the documents of design and drawings of the plaintiff's new lawnmower. The witness statement had described the process of the design of a new lawnmower shortly to be produced by the plaintiff which incorporated the patented invention.

[61] The defendant thereupon sought discovery of the design documents and drawings relating to the plaintiff's lawnmower. The plaintiff resisted the application, claiming that the witness statement and the design documents and drawings were privileged documents and praying that the defendant be precluded from obtaining discovery of the documents.

[62] In allowing the defendant's motion for discovery, Hoffmann J held as follows in the head notes under 'held' at p 753:

> once a document had been disclosed pursuant to R.S.C., O 38, r 2A a claim to privilege could no longer be asserted in respect of it; that since the witness statement had already passed into the hands of the defendant, the question was not one of privilege but of admissibility; that its exclusion would be contrary to the policy of O 38, r 2A, which was that the parties should so far as possible, come to trial with all the relevant documents and information as to what the other side's case was going to be, and thus to avoid surprise or the possible need for an adjournment; and that, in all the circumstances, the defendant was entitled to the order for discovery sought (post, p 755B-F).
>
> *Comfort Hotels Ltd v Wembley Stadium Ltd* [1988] 1 WLR 872 considered.

[63] The plaintiff had argued that the defendant was not entitled to rely upon the contents of the witness statement in support of its motion for specific discovery because the witness statement is a privileged document and that it was only produced pursuant to RSC O 38 r 2A.

[64] However, in rejecting the plaintiff's argument, learned judge said as follows at p 754:

> … Sub-rule (8) of that rule provides: 'Nothing in this rule shall deprive any party of his right to treat any communication as privileged or make admissible evidence otherwise inadmissible.' In *Comfort Hotels Ltd v Wembley Stadium Ltd* [1988] 1 WLR 872 I dealt with the question of whether O 38 r 2A affected a litigant's privilege not to disclose information and documents which he had obtained for the purposes of the litigation. I said in that case, at p 877:
>
> A privilege operates by way of exception to the normal rules of discovery and evidence under which a party or witness can be compelled to disclose documents or information. It confers on a party or witness a right to refuse to disclose documents or information which fall within the scope of the privilege. O 38 r 2A has the effect of empowering the court to make it a condition of a party's ability to lead oral evidence at the trial that he should have given prior notice of such evidence in the form of a written statement served on the other parties. It does not mean that he can be compelled to disclose any document or information. Anything which he does not wish to disclose he may still keep to himself. It is only if he wants to disclose the information by way of evidence at the trial that he may now be required as a precondition to disclose it in written form in advance.
>
> It seems to me that once the statement has been disclosed pursuant to the rule, there can no longer be any question of privilege. It is not possible to assert a right to refuse to disclose in respect of a document which has already been disclosed. Once the document has passed into the hands of the other party the question is no longer one of privilege but of admissibility. So, for example, O 38 r 2A (4) deals with the admissibility at the trial of a statement from a witness who has not been called.
>
> Is there any reason why such a document should not be admissible on an application like this? In my judgment its exclusion would be contrary to the policy of which O 38 r 2A is one manifestation. The general policy which O 38 r 2A embodies is that the parties should so far as possible come to trial fully prepared with all the relevant documents and with information about what the other side's case is going to be, so that no one will be taken by surprise and no adjournment of the trial will be necessary in order to enable a party to gather information which could have been obtained before. If the witness statement has to be treated as inadmissible for the purposes of a discovery application it only means that that discovery application will be postponed till the evidence in the witness statement is given as evidence at the trial. As a result there may have to be an adjournment of the trial until that discovery has been given and considered by the party who seeks it. This would be a waste of time and costs. In my judgment therefore witness statements once disclosed are admissible for the purposes of applications for specific discovery. I need not say anything about whether there might be other kinds of applications in which they would not be so admissible.

[65] The plaintiff in the above case had also argued that the defendant was not entitled to discovery of the documents of the design and drawings of the lawnmower on the ground that they were protected by confidentiality.

[66] In rejecting the plaintiff's argument, learned judge said as follows at pp 755G-H and 756A-D:

> *Prima facie therefore it appears to me that the documents of which discovery is sought under paragraph 1 of the minutes of order are relevant and discoverable. Mr Drysdale Wilson objected to their production, or at any rate to their production without restriction, on the grounds of confidentiality. The parties are of course commercial competitors and the documents relate to a new lawnmower which the plaintiff is about to launch. Instead of producing the drawings, the plaintiff has, offered to allow the defendant to inspect a pre-production sample of the mower itself in the offices of the solicitors or counsel on terms that that inspection is to be limited to counsel, solicitors, patent agents and the two witnesses whom the defendant proposes to call at the trial.*
>
> *No evidence has been put in by the plaintiff as to the nature of the confidentiality except the general claim that a product which has not yet been launched upon the market has a commercial confidence attached to it …*
>
> Discovery is of course always subject to the implied undertaking that the documents will not be used otherwise than for the purposes of the action and this is not a case in which… requires a special order to be made. It would in my view be sufficient if the order were to provide that the documents be disclosed only to counsel, solicitors, the patent agent and the two witnesses whom it is proposed to call in the action. On those terms therefore I will make the order in terms of the minute but without paragraph 2 of the schedule which Mr Pumfrey has not pursued.
>
> (Emphasis added.)

[67] Based on my reading and understanding of the decision of learned judge in the above case, learned judge had rejected the plaintiff's objection to the defendant's application for discovery which related to specific documents ie the witness statement of one of the plaintiff's witnesses and the drawings mentioned therein of a new lawnmower which has not yet been launched upon the market by the plaintiff on the following grounds:

(a) with regard to the witness statement, the question of privilege did not arise because the plaintiff had already disclosed the witness statement pursuant to RSC, O 38 r 2A and the only issue left to be determined is the admissibility of the witness statement at the trial of the plaintiff's action; and

(b) with regard to the drawings of the lawnmower, the question of privilege failed because the documents which belonged to the plaintiff were relevant and discoverable as the plaintiff did not adduce any evidence of the nature of the confidentiality attached to them which was known or

accepted by the law as an exception to the normal rules of discovery and evidence under which a party or witness can be compelled to disclose documents or information.

[68] In my respectful view, the above case is distinguishable from the facts and circumstances of the instant case. This is because the objections raised and relied upon by the defendants to the plaintiff's application for specific discovery of the EAR relate to the references made by the plaintiff to the contents of the defendants' three witness statements which refer to the EAR. The court noted that the three witness statements are of the defendants' three witnesses, namely, the first, second and third defendants, who will personally testify during the full trial. The defendants submitted that although the defendants' three witness statements have been disclosed to the plaintiff as they were served on the plaintiff pursuant to the direction of this court given during pre-trial case management proceedings under O 34 r 2 of the RC 2012, the plaintiff had failed to exhibit them as exhibits in the plaintiff's AIS of the application.

[69] This court had agreed with and accepted the defendants' objection and submission based on the reason given by the defendants. It is trite law that almost all interlocutory applications are heard by way of affidavit evidence and documentary evidence relied upon by any party to support his application or his objection to the application must be exhibited therein otherwise the party concerned cannot rely on it in his submissions to support his application or objection (see O 32 rr 1 and 13 of the RC 2012). One of the very few exceptions to this general rule of procedure and evidence relates to an application to strike out a pleading on the ground that it does not disclose a reasonable cause of action or defence as the case may be (see O 18 r 19(2) of the RC 2012).

[70] Mr Mathias Chang had argued that this court should take cognisance of the fact that the defendants' three witness statements have already been filed in court and that, consequently, there was no necessity for the plaintiff to exhibit them in the plaintiff's AIS and that, therefore, the plaintiff could make references to their contents in their submissions during the hearing of the application and that the court ought to grant to the plaintiff order in terms of its application for the specific discovery of the EAR. Nevertheless, this court rejected his argument on the ground that this court had no discretion to disregard the trite law or general rule as to procedure and evidence as mentioned above.

[71] In addition to what has been mentioned above, another reason why this court was of the respectful view that the above case is distinguishable from the instant case on facts and circumstances is that in the instant case, the

defendants had submitted that the plaintiff's application for specific discovery of the EAR should be rejected on the grounds that the legal professional privilege in the EAR does not belong to the defendants, the issue whether the EAR is protected by legal professional privilege has already been decided by Zabariah Yusof J and her decision is final, there being no appeal filed against her decision by the plaintiff.

[72] Hence, in my respectful view, the defendants in the instant case have successfully established before this court that the EAR falls within a legally recognised exception, to the general or normal rules of discovery and evidence under which a party can be compelled to disclose documents or information, as expressly provided in s 126 of the Evidence Act 1950 unlike the documents of design and drawings of the plaintiff's yet to be launched new lawnmower in the above case.

[73] As for *Burnell v British Transport Commission*, the fourth English case cited by Mr Mathias Chang, this court noted that after Denning LJ had stated the facts, the learned judge continued as follows at p 190:

> The question for this court (and the question which Sellers J had to decide) is whether, in those circumstances, the examining counsel had a right to call for the statement and to insist on it being put in evidence. Sellers J ruled that he had that right. It seems to me that the judge was correct, because although this statement may well have been privileged from production and discovery in the hands of the Transport Commission at one stage, *nevertheless when it was used by cross-examining counsel in this way he waived the privilege, certainly for that part which was used; and in a case of this kind, if the privilege is waived as to the part, it must, I think, be waived also as to the whole. It would be most unfair that cross-examining counsel should use part of the document which was to his advantage and not allow anyone not even the judge or the opposing counsel, a sight of the rest of the document, much of which might have been against him. It seems to me that the ruling of Sellers J was correct. It was in accordance with the practice as I have always understood it.*
>
> *I would like to add that, since the Evidence Act, 1938, the document, once it was legitimately in the presence of the court, would be admissible as evidence under that Act also. I think, therefore, that we should look at the document, just as the judge did.*
>
> (Emphasis added.)

[74] In my respectful view, the above case is clearly distinguishable from the facts of the instant case.

[75] Firstly, the legal issue concerning waiver of the legal professional privilege in a document prepared by solicitors for their client did not arise in the above case.

[76] Secondly, the full trial of the plaintiff's action against his employers for

damages for personal injuries had already commenced. It was during the full trial when the plaintiff was being cross-examined by the defendant's learned counsel ie the cross-examining counsel, that the plaintiff was asked whether he had said 'x' and 'y' in a previous statement made and signed by him and the plaintiff agreed that he had. At this juncture the plaintiff's learned counsel asked that the whole statement should be produced on the ground that there was a waiver of the privilege in the statement by the defendant but this was objected to by the cross-examining counsel on the ground that so long as the witness had not denied what had been put to him from the statement, it remained a privileged document.

[77] Thirdly, the document concerned was previously made by the witness ie the plaintiff, who was being cross-examined during the full trial whereas in the instant case, the document concerned was not made by any of the defendant's three witnesses and they have also not testified as witnesses as the full trial has yet to commence.

[78] Hence, this court was of the view that the plaintiff's reliance on the above case in order to support the application for specific discovery of the EAR on the ground that the defendants have waived their legal professional privilege in the EAR was wholly misplaced.

[79] It was clear to this court, that the plaintiff has again resorted to fishing for evidence in order to support its claim against the defendants. This attempt on the plaintiff's part is clearly shown in para 27 of p 13 of the plaintiff's English version of her SOC.

The paragraph reads as follows:

> 27 The Plaintiff avers that as she is denied access of the said audit report, she reserves the right to amend the Statement of Claim as and when the said report is made available in the course of Discovery of Documents before trial so as to plead precisely the libelous words and or statements contained in the said audit report over and above the slanderous words and statement referred to in paragraph (24) above.

[80] The court also noted that subsequent to filing her SOC, the plaintiff has made repeated unsuccessful attempts, to compel the defendants to disclose the contents of the EAR by giving to the plaintiff a copy thereof.

[81] In this respect, by virtue of the doctrine of res judicata, the plaintiff can no longer reopen the issue whether the EAR is a document protected by legal professional privilege since it has chosen not to appeal to the Court of Appeal against the decision of Zabariah Yusof J dated 29 November 2010. learned judge had held that the EAR is protected by legal professional privilege.

[82] On the doctrine of res judicata and on when does the doctrine bar a litigant from reopening an issue, Mr Mohd Arief Emran bin Ariffin, learned counsel for the defendants, has cited the decision of the Federal Court in *Joseph Paulus Lantip & others v Unilever plc* [2012] 7 CLJ 693 in support of his submission that the plaintiff cannot reopen the issue whether the EAR is protected from disclosure by legal professional privilege by virtue of the decision of Zabariah Yusof J.

[83] This court noted that in that case, Tun Ariffin bin Zakaria, Chief Justice Malaysia, in delivering the judgment of the Federal Court has said as follows at p 17:

> [32] In *Hartecon JV Sdn Bhd & Anor v Hartela Contractors Ltd* [1996] 2 MLJ 57, Gopal Sri Ram JCA (later FCJ) observed that:
>
> We cannot over emphasize the proposition that once a judge makes a ruling, substantive or procedural, final or interlocutory, it must be adhered to and May not be reopened willy-nilly.
>
> The parties are bound by the rulings of the court under the principle of res judicata. It is also important to observe that a decision given by a court at one stage on a particular issue is binding on it at a later stage in the same or subsequent suit.
>
> [33] In the present case, counsel for the plaintiffs submit that having failed in its bid to set aside the leave granted under O 11 r 4F(1) of the RHC, the fourth defendant is barred by the doctrine of res judicata from applying to strike out the action under O 18 r 19(1) of the RHC on the ground that the test to determine whether or not leave under O 11 r 4(1) of the RHC should be granted is the same or substantially the same as the test to determine whether or not the claim ought to be struck out under O 18 r 19(1) of the RHC.
>
> [34] As observed above, for res judicata to apply, the issue in the second or subsequent application must be the same with the issue decided earlier by the court. Therefore, rightly the documents relating to the two applications under O 11 and O 12 of the RHC properly ought to have been placed before us. Unfortunately this was not done. We can appreciate why this is so, as the appeal before the Court of Appeal was an appeal against the High Court Judge's decision in dismissing the fourth defendant's application under O 18 r 19(1) of the RHC. So, to that extent, we are handicapped in our deliberation. However, going by the submission of counsel for the plaintiffs, his contention is that the test applicable in the two earlier applications are the same or similar to the test applicable in the O 18 r 19(1) of the RHC application, therefore, the fourth defendant is stopped from making the application under O 18 r 19(1) of the RHC as it is bound by earlier decisions of the court on the same or similar issue.

[84] At pp 24–25 the learned Chief Justice Malaysia said as follows:

A [48] We agree with learned counsel for the fourth defendant that O 18 r 19(1) of the RHC application involves a different exercise from that of O 11 of the RHC. In the latter case, the court merely considers whether it could exercise jurisdiction over the fourth defendant. Whereas, in the O 18 r 19(1) of the RHC application, the court needs to consider whether or not, on the merits, the plaintiffs' claim is sustainable, B vexatious or otherwise an abuse of the process of court. In the present case, when the High Court heard the fourth defendant's application under O 12 r 7 of the RHC, it had examined and adjudicated on the issue of whether the plaintiffs claim, assuming it to be true, would attach liability against the fourth defendant and that liability is within the territorial jurisdiction of the court. At the stage, the court did not examine and adjudicate on the merits of the claim. learned judge in dismissing the C fourth defendant's application merely considered the plaintiffs' allegation as pleaded without the benefit of the four defendant's counter allegations as found in the affidavit supporting the fourth defendant's application under O 18 r 19(1) of the RHC. This is evident in the judgment of learned High Court Judge in regard to O 12 r 7 of the RHC application.

D

[85] Further, at p 26 the learned Chief Justice Malaysia said as follows:

E [50] There is nothing before us showing that these same issues were relied upon by the fourth defendant in support of its application under O 12 r 7 of the RHC. Therefore, in the circumstances, we hold that the fourth defendant could not be barred, on the ground of res judicata, from raising these issues in the striking out application.

F

[86] In my judgment, upon applying the decision of the Federal Court in the above case to the facts and circumstances of the instant case, if the plaintiff is seeking to reopen the issue whether the EAR is a document protected by legal professional privilege the plaintiff can be barred by this court from raising the same issue based on the doctrine of res judicata.

G

[87] However, if, in this application, the plaintiff is not disputing that the EAR is protected by legal professional privilege but is merely raising an entirely new or different issue ie whether the legal professional privilege in the EAR has H been waived the plaintiff cannot be barred by this court from raising this issue as it is an entirely new issue which is different from the issue which was decided by Zabariah Yusof J on 29 November 2010.

[88] Having heard both the parties and the authorities cited by them against I the backdrop of the contents of the application and the affidavits filed by both the parties, the court was of the respectful view that the plaintiff was trying to do two things in the application.

[89] The first was to raise a different or totally new issue ie whether there is

a waiver of the legal professional privilege in the EAR by the defendants. In my judgment the plaintiff was entitled to do that.

[90] The second was to reopen an old issue which had already been decided ie whether the EAR is protected from disclosure by legal professional privilege. In my judgment, the plaintiff was not entitled to do that based on the doctrine of res judicata.

[91] I shall now deal with another issue which was raised by the plaintiff ie whether the defendants are relying on the contents of the EAR in order to prove their defences and counterclaims against the plaintiff.

[92] Having perused the defendants' defences and counterclaims and the defendants' opening statement dated 9 September 2013, I am of the view that ex facie and contrary to what has been strenuously asserted and submitted by the plaintiff before this court, the defendants in the instant case are not relying on the contents of the EAR to prove their defences and counterclaims against the plaintiff.

[93] This is so, even though the defendants have made references to the fact of the existence of the EAR in their opening statement and in the defendants' defences and counterclaims because the references to the expression 'employment audit report' therein were merely to categorically assert that the defendants are neither the makers nor the publishers of the EAR, that the defendants did not circulate the EAR, that the EAR is a legally privileged document prepared by Malaysian solicitors for Tiffany & Co, New York and that the EAR is a legally privileged document as confirmed by this honourable court in its order dated 29 November 2010.

[94] This is clearly borne out in the following paragraphs in the defendants' opening statement:

> DEFENDANTS' DEFENCE
>
> 1. …
>
> 2. The defendants shall prove that the plaintiff's claims are baseless. In summary, the facts and documents produced in this case shall prove that:
>
> (A) *Plaintiff's Claim that the defendants had Conspired to injure her*
>
> i. …
>
> ii. The defendants did not publish and/or circulate the *Employment Audit Report*. The *Employment Audit Report* is a legally privileged document prepared by Malaysian solicitors for Tiffany & Co. The

Employment Audit Report is a legally privileged document as confirmed by this Honourable Court in its order dated 29 November 2010.

iii. …

iv. …

v. …

(B) *Plaintiff's Claim that the first, third and fourth defendants had Slandered her at the meeting on 3 August 2009*

i. …

ii. …

iii. …

iv. …

(C) *Claim of Conspiracy and Malicious Falsehood against the defendants.*

i. The *Employment Audit Report* is a legally privileged document prepared by Malaysian solicitor for Tiffany & Co. The *Employment Audit Report* was held to be a legally privileged document as confirmed by this Honourable Court.

ii. …

iii. …

iv. …

v. …

vi. …

vii. …

viii. …

SECOND, THIRD AND FOURTH DEFENDANTS' COUNTERCLAIM

3….

4….

5….

6….

7….

8….

(Emphasis added).

[95] The references to the EAR in the first defendant's statement of defence and counterclaim are reproduced below:

B EMPLOYMENT AUDIT

9. The first Defendant admits paragraph 13 of the Statement of Claim only in so far as the averments state that the Plaintiff was informed by the fourth Defendant in June 2009 to contact the first Defendant's solicitors to arrange for an employment audit ('the Employment Audit').

10. In response to paragraph 14 of Statement of Claim, the first Defendant states that the Employment Audit was carried out under instructions of Tiffany and Company, in New York ('Tiffany New York') following complaints received by anonymous employees regarding the management and operations of the first Defendant by the Plaintiff. The Employment Audit was carried out by Messrs Wong & Partners from 22-06-2009 to 25-06-2009 and the Plaintiff was consulted for her views in response to some of the relevant questions raised in the Employment Audit. Save for the aforesaid, the contents of paragraph 14 of the Statement of Claim are denied.

…

12 …

13. The first Defendant denies paragraphs 17 to 19 of the Statement of Claim and puts the Plaintiff to strict proof. Prior to the first Defendant commencing formal internal investigations, the first Defendant through the third and fourth Defendants had met with the plaintiff on 3-08-2009 to explain the findings of the Employment Audit and attempted to resolve the concerns with the Plaintiff by providing the Plaintiff with an opportunity to consider a voluntary exit from the first Defendant.

…

D ALLEGATIONS OF CONSPIRANCY

24 …

25. In reply to paragraphs 24 and 27 of the Statement of Claim, the first Defendant states that the Employment Audit Report was prepared for Tiffany New York as privileged legal advice and therefore could not be disclosed to the Plaintiff on grounds on confidentiality. However, the first Defendant reiterates that it made available to the Plaintiff all documents and supporting information required by the Plaintiff for the purpose of responding to Show Cause Letters, and upon which the Show Cause Letters were based.

E ALLEGATIONS OF SLANDER

26…

27…

28…

29…

30…

31. The first Defendant denies paragraph 28 of the Statement of Claim and reiterate that the actions of the Defendants were done in good faith and without malice, and that the publication of the Employment Audit, if any, was made to those with a

common and corresponding interest in the subject matter of the Employment Audit, and had a duty and/or interest to receive the Employment Audit. The first Defendant repeats paragraph 28 above.

…

F ALLEGATIONS OF CONSPIRACY AND MALICIOUS FALSEHOOD

37…

38…

PARTICULARS

(a) that the Employment Audit Report was prepared for Tiffany New York as privileged legal advice and therefore could not be disclosed to the plaintiff on grounds on confidentiality. However, the Defendants made available to the Plaintiff all documents and supporting information required by the Plaintiff for the purpose of responding to the show cause letter, and upon which the show cause letter was based.

(b)…

(c)…

(d) The first Defendant had no legal obligation to disclose the identities of the complainants of the various allegations in the Employment Audit Report and the show cause letters dated 11–08–2009 and 28–08–2009 as the same were not necessary for the Plaintiff to prepare an adequate and complete response to the allegations levied against her; and

(e)…

39–42…

[96] The references to the EAR in the second, third and fourth defendants' statement of defence and counterclaim are reproduced below:

B EMPLOYMENT AUDIT

9. The second to fourth Defendants admit paragraph 13 of the Statement of Claim only in so far as the averments state that the Plaintiff was informed by the fourth Defendant in June 2009 to contact the first Defendant's solicitors to arrange for an employment audit ('the Employment Audit').

10. In response to paragraph 14 of Statement of Claim, the second to fourth Defendants state that the Employment Audit was carried out under instructions of Tiffany and Company, in New York ('Tiffany New York') following complaints received by anonymous employees regarding the management and operations of the first Defendant by the Plaintiff. The Employment Audit was carried out by Messrs Wong & Partners from 22–06–2009 to 25–06–2009 and the Plaintiff was consulted for her views in response to some of the relevant questions raised in the Employment Audit. Save for the aforesaid, the contents of paragraph 14 of the Statement of Claim are denied.

11. As the Employment Audit was carried out under the instructions of Tiffany New York, the report for the same ('Employment Audit Report') was forwarded to Tiffany New York. Following the result of the Employment Audit, it was confirmed that there were several instances of potential non-compliance with Malaysian law under the Plaintiff's direct management as Director-Malaysia of the first Defendant, which required remedial action. While there was an initial intention to share the Employment Audit Report with the Plaintiff at the material time, it was later decided that formal investigations were required to be commenced in Malaysia for the Plaintiff to formally respond to the concerns raised in the Employment Audit Report, after an initial attempt to resolve the matter with the Plaintiff failed. Save for the aforesaid, the second to fourth Defendants deny paragraph 15 of the Statement of Claim.

12. The second to fourth Defendants admit paragraph 16 of the Statement of Claim.

13. The second to fourth Defendants, in particular the third and fourth Defendants, deny paragraphs 17 to 19 of the Statement of Claim and puts the Plaintiff to strict proof. Prior to the first Defendant commencing formal internal investigations, the first Defendant through the third and fourth Defendants had met with the plaintiff on 3–08–2009 to explain the findings of the Employment Audit and attempted to resolve the concerns with the Plaintiff by providing the Plaintiff with an opportunity to consider a voluntary exit from the first Defendant.

…

D. ALLEGATIONS OF CONSPIRANCY

24…

(a) …

(b) the statements made in the Employment Audit Report and in the e-mails from the Defendants are protected by qualified privilege, particulars of which will be set out below, and are in any event true in substance and in fact.

25. In reply to paragraphs 24 and 27 of the Statement of Claim, the second to fourth Defendants states that the Employment Audit Report was prepared for Tiffany New York as privileged legal advice and therefore could not be disclosed to the Plaintiff on grounds on confidentiality. However, the first Defendant reiterates that it made available to the Plaintiff all documents and supporting information required by the Plaintiff for the purpose of responding to Show Cause Letters, and upon which the Show Cause Letters were based.

E. ALLEGATIONS OF SLANDER AGAINST THE third AND fourth DEFENDANTS

26….

27….

28….

29….

30….

31. The third and fourth Defendants deny paragraph 28 of the Statement of Claim and reiterate that the actions of the Defendants were done in good faith and without malice, and that the publication of the Employment Audit, if any, was made to those with a common and corresponding interest in the subject matter of the Employment Audit, and had a duty and/or interest to receive the Employment Audit. The first Defendant repeats paragraph 28 above.

…

F. ALLEGATIONS OF CONSPIRACY AND MALICIOUS FALSEHOOD

37….

38….

PARTICULARS

(a) that the Employment Audit Report was prepared for Tiffany New York as privileged legal advice and therefore could not be disclosed to the plaintiff on grounds on confidentiality. However, the Defendants made available to the Plaintiff all documents and supporting information required by the Plaintiff for the purpose of responding to the show cause letter, and upon which the show cause letter was based.

(b)…

(c)…

(d) The Defendants had no legal obligation to disclose the identities of the complainants of the various allegations in the Employment Audit Report and the show cause letters dated 11–08–2009 and 28–08–2009 as the same were not necessary for the Plaintiff to prepare an adequate and complete response to the allegations levied against her; and

(e)…

39–52…

[97] Be that as it may, I am of the respectful view that it is premature for the court to decide this issue at this stage since the issue concerns the merits of the defendants' defences and counterclaims which can only be decided by the court at the conclusion of the full trial. The plaintiff filed this action in 2008. All the directions for the full trial have been given by the court during pre-trial case management proceedings and they have been duly complied with by the parties. The case is ready to proceed to full trial.

[98] It is trite law that the burden is on the plaintiff to prove her claim. It is for the defendants to disprove the plaintiff's claim and to prove their defences and counterclaims during the trial.

[99] The plaintiff is entitled to submit at the conclusion of the full trial that the defendants have failed to discharge their burden of proof on the ground that the EAR is an essential piece of documentary evidence which must be produced by the defendants to prove their pleaded defences and counterclaims against the plaintiff and in the absence of the EAR, the plaintiff's claim must succeed and the defendants' defences and counterclaims must fail.

[100] In my view, the alternative prayer of the plaintiff for the striking out of all references to the EAR in the defendants' defences and counterclaims had no merit and ought to be dismissed. This is because the power of the court to strike out the references can only be exercised firstly, pursuant to O 18 r 19(1) of the RC 2012 on the ground that the defendants' defences and counterclaims as they stand disclose no reasonable defence, or it is scandalous, frivolous or vexatious; or it may prejudice, embarrass or delay the fair trial of the action; or it is otherwise an abuse of the process of the court and secondly, pursuant to O 92 r 4 of the RC 2012 in exercise of the inherent jurisdiction of the court to prevent injustice or an abuse of the process of the court.

[101] Based on the facts before the court, the court was not satisfied that the defendants' defences and counterclaims do not disclose a reasonable defence or that they are scandalous, frivolous or vexatious or they may prejudice, embarrass or delay the fair trial of the action or they are otherwise an abuse of the process of the court or that injustice would be caused to the plaintiff if they are not struck out by the court amended by deleting all references to the EAR therein or all references to the EAR therein are not struck out by the court.

I shall now deal with issue (4).

Issue (4): What is the amount of costs which ought to be awarded by the court to the defendants based on the following grounds?

[102] In my judgment, the amount of RM15,000 which was awarded by the court for encl (83) and for costs thrown away for the day of the full trial, scheduled to begin on 20 September 2013 but which had to be vacated, was fair and reasonable and not excessive based on the following grounds:

(a) the third defendant had specifically flown into Malaysia from Hong Kong before 20 September 2013 in order to witness the plaintiff's evidence-in-chief on 20 September 2013 in order to prepare for her cross examination since the case was fixed for full trial on that day;

(b) the whole legal team of the defendants had also attended court that day for the full trial;

(c) the defendants' learned counsel had to prepare and file the defendants' affidavit in reply within a mere two days as the plaintiff had opted to file

the application just two days before the commencement of the full trial even though the plaintiff's suit was filed on 8 December 2009 and the ruling of the High Court that the EAR is a legally privileged document was made on 29 November 2010 ie about three years prior to the filing of the application by the plaintiff;

(d) the time of the defendants' legal team and the third defendant was wasted because the plaintiff's learned counsel did not prepare his outline submissions in order to serve it on learned counsel for the defendants and to hand it to the court either a day before the date fixed for the hearing of the application or on the date itself;

(e) the time of the defendants' legal team and the third defendant was also wasted because learned counsel for the plaintiff chose to make lengthy oral submissions knowing fully well that the case was fixed for full trial that very day and that day being a Friday there would be a long lunch break from 12.15pm to 2.45pm in order to allow all the Muslim men who are lawyers, litigants, witnesses, judges, court officers and court staff to perform their Friday prayers in the mosque or surau;

(f) during his oral submissions learned counsel for the plaintiff also insisted on reading out to the court each and every excerpt of the four English authorities relied upon by him to support his client's application with the objective of persuading and convincing the court to apply to his application the same principles as contained in the decisions in those cases and to rule, accordingly, in his favour;

(g) as the plaintiff had taken such a long time to make her oral submissions to the court through her learned counsel, the full trial could not proceed and the date initially fixed for the full trial ie 20 September 2013 had to be vacated and the full trial adjourned to another date;

(h) the court also noted that based on the notes of proceedings as recorded by the court the parties had appeared before me in chambers on 20 September 2013, at 9.20am for the hearing of this application ie encl (83), and another application ie encl (86), and that encl (86) was only served on learned counsel for the defendants at 4.30pm the day before;

(i) in her application, in encl (86), the plaintiff had sought to, inter alia, cite learned counsel for the defendants for contempt for interfering with the subpoenaed witness, namely, Mr Yiap Tiew Kuang, on the ground that the plaintiff's learned counsel had instructed the subpoenaed witness to present himself at his office for the purpose of recording a witness statement from him in the form of an affidavit but learned counsel for the defendants had informed the subpoenaed witness that there was no requirement for him (the subpoenaed witness) to present himself at the office of learned counsel for the plaintiff to have his witness statement recorded;

(j) the defendants' learned counsel had vehemently denied the plaintiff's allegation and informed the court that he wished to file an affidavit in reply to the plaintiff's affidavit in support of encl (86);

(k) the court noted that there was no direction made by the court to that effect on the last case management date on 9 September 2013 as the directions given by the court on that date were for the filing of a list of questions for each of the two subpoenaed witnesses, namely, Mr Yiap Tiew Kuang and Mr Tan Poh Oon, and for the service of each of the lists of questions together with each of the subpoena on them;

(l) learned counsel for the plaintiff conceded that there was no such direction made by the court;

(m) nevertheless, he informed the court that he wished to obtain the witness statement of the subpoenaed witness in the form of an affidavit on the ground that some of the High Courts in Kuala Lumpur require the witnesses to give their witness statements in the form of an affidavit as opposed to the High Court in which I preside which require the party concerned to prepare, file and serve on the witness and the opposing parties a list of questions for the witness concerned;

(n) the defendants' learned counsel also informed the court that he would arrange for another counsel to conduct the hearing of encl (86) since the plaintiff's application concerned allegations made against him by the plaintiff;

(o) the court then adjourned encl (86) to Friday, 18 October 2013 for hearing at 9am;

(p) in respect of encl (83), learned counsel for the defendants informed the court that he had, on 19 September 2013, filed and served on the plaintiff's learned counsel, an affidavit in reply, encl (85), affirmed by Bianca So Ching Yee, the third defendant;

(q) learned counsel for the plaintiff also informed the court that there was no necessity for the plaintiff to file an affidavit in reply to the defendants' affidavit in reply and that the plaintiff was ready to proceed with the hearing of encl (83) that very same morning;

(r) learned counsel for the defendants then suggested that the matter be heard in open court which suggestion was agreed to by the court because both parties did not come prepared with their outline submissions and based on the court's previous experience, Mr Mathias Chang, learned counsel for the plaintiff, had shouted at the judge without realising it when the matter or matters on which he was submitting became contentious and he had to be told by Mr Mohd Arief Emran bin Ariffin, learned counsel for the defendants, not to shout at the judge when he is submitting before the court or informing the court about the events

which have transpired between the parties concerning the case and the nature of the applications filed by the parties in the instant case;

(s) hence, in order to maintain the dignity and decorum of the court proceedings and to ensure that the oral submissions of learned counsels for both the parties have been duly recorded in the CRT system ie the court recording and transcription system, which is installed in the open court but not in chambers and in order to avoid any allegation or complaint by any of the parties that he was not given a fair hearing and an opportunity to ventilate his arguments and submissions before the court, the court decided to hear encl (83) in open court;

(t) nevertheless, as the court had other chamber matters that morning, the court could only commence the hearing of encl (83) in open court at 10.54am;

(u) the court rejected the submissions of learned counsel for the plaintiff that he was entitled to file encl (83) at such a late stage of the proceedings ie just two days before the full trial was scheduled to begin, and that based on that entitlement, costs should not be awarded at all to the defendants and that if the court was inclined to award costs to the defendants, a proper award should be costs iin the cause;

(v) the leaned counsel for the plaintiff also sought to justify an award for no order as to costs on the ground that the previous full trial dates schedules on 5, 6 and 7 August 2013 were vacated at the instance of learned counsel for the defendants but the plaintiff did not ask for costs to be awarded against the defendants even though the plaintiff had already made preparations for the full trial;

(w) however, the court rejected the plaintiffs submission that just because the plaintiff did not ask for costs on one of the case management dates on 8 May 2013 when the first set of full trial dates were vacated by the court upon the request of the defendants the court should either make no award of costs in favour of the defendant or make an award for costs in the cause when the court vacated the full trial date on 20 September 2013;

(x) the reason is because the first set of full trial dates were not vacated on the date fixed for the full trial of the case. The full trial dates on 5, 6 and 7 August 2013 were vacated prior to those dates ie on one of the case management dates on 8 May 2013. In fact based on the notes of proceedings recorded in the minutes of the file, learned counsel for the defendants had indicated to the court as early as on 17 April 2013 which is a good 3 months before the date of the full trial that the full trial dates of 5, 6 and 7 August 2013 were not suitable to him as they were very close to the Hari Raya Puasa which fell on 8 and 9 August 2013;

[103] For the sake of completeness, the court shall set out in this judgment the events which have transpired post — 20 September 2013 concerning four enclosures ie encls (86), (89), (92) and (96) (the 'four enclosures') which were filed by the respective parties and which had been scheduled for hearing on 18 October 2013 at 9am.

[104] Firstly, based on the experience of this court with regard to the hearing of encl (83), the court had, on 17 October 2013, issued a letter to both parties to bring with them their outline submissions and bundle of authorities for each of the four enclosures.

[105] Enclosure (86) was the plaintiff's application for extension of time to serve the writ of subpoena ad testificandum and duces tecum dated 1 August 2013 on the subpoenaed witness, to file an additional list of questions for the subpoenaed witness and to cite Mr Mohd Arief Emran bin Ariffin, learned counsel for the defendants for contempt of court for interfering with the plaintiffs witness. Enclosure (86) is supported by the plaintiff's affidavit in support affirmed by the plaintiff herself, encl (87).

[106] The court noted that the defendants had filed an affidavit in reply, encl (88), affirmed by Mr Mohd Arief Emran bin Ariffin, to rebut the plaintiff's affidavit in support of her application, encl (87), to cite him for contempt of court, and that the plaintiff had also filed an affidavit in reply, enclosure (94) affirmed by her solicitor, Mr Mohd Akmal Afiq bin Mohammad, to the defendants' affidavit in reply, encl (88).

[107] Enclosure (89) was the plaintiff's application for a stay of proceedings pending the outcome of the plaintiff's appeal to the Court of Appeal against the decision of this court in respect of encl (83).

[108] Enclosure (92) was Mr Yiap Tiew Kuang's application to set aside the writ of subpoena *ad testificandum* and *duces tecum* dated 1 August 2013 which had been applied for by the plaintiff and issued by the court and served on him by the plaintiff on 17 September 2013. He was represented by Mr Richard Kok of Messrs Donny & Hong. Mr Richard Kok appeared together with Mr Simon Hong.

[109] Enclosure (96) was the plaintiff's application to set aside Mr Yiap Tiew Kuang's notice of application dated 8 October 2013, encle (92), to set aside the writ of subpoena *ad testificandum* and *duces tecum*. Enclosure (96) was supported by the plaintiff's affidavit in support, encl (97).

[110] On 18 October 2013, the court heard all the four enclosures in the

A open courtroom. At the outset upon the request of the defendants, the court vacated the full trial dates of 19 and 20 December 2013 which had been fixed by the court on 20 September 2013.

B **[111]** The plaintiff then withdrew her application in encl (89) for a stay of the proceedings pending the outcome of her appeal to the Court of Appeal with no order as to costs. The court, consequently, struck out encl (89) with no order as to costs.

C **[112]** The plaintiff then tendered to the court on the morning of 18 October 2013 a copy of her skeletal submissions for encls (86) and (89) (the 'two enclosures') together with two bundles of authorities, one for each of the two enclosures.

D **[113]** The defendants had, on the other hand, put in a copy of their written submissions together with two volumes of their bundle of authorities a day earlier ie 17 October 2013.

E **[114]** Like the plaintiff, the applicant in encl (92), which was an application to set aside the writ of subpoena *ad testificandum* and *duces tecum*, also tendered a copy of his written submissions together with a bundle of authorities to the court on the morning of 18 October 2013.

F **[115]** Madam Chew Kerk Ying, the lead counsel for the defendants, then informed the court that the defendants would not be calling Mr Yiap Tiew Kuang as their witness as he is not relevant to the defendants' case. She also informed the court that it is up to the plaintiff to call him if the plaintiff wishes to call him as her witness.

G **[116]** She further informed the court that the defendants were agreeable to prayers (a) and (b) of encl (86) subject to reserving their right to object to any question posed in the list of questions to the subpoenaed witness.

H **[117]** Mr Mathias Chang then informed the court that the plaintiff was agreeable to the withdrawal of prayers (c), (d), (e) and (f) of encl (86) with costs in the cause. As the defendants had consented to prayers (a) and (b) of encl (86) subject to the reservation of their right to object to any of the questions posed to Mr Yiap Tiew Kuang, (the 'subpoenaed witness'), during the full trial of the

I case, and as the plaintiff wished to withdraw prayers (c), (d), (e) and (f) of encl (86) with costs in the cause, the court granted order in terms of prayers (a) and (b) subject to the right of the defendants to object to any of the questions set out in the list of questions and posed to the subpoenaed witness during the full trial of the case.

[118] Mr Mathias Chang then withdrew prayers (c), (d), (e) and (f) of encl (86) with costs in the cause. A

[119] The court, consequently, struck out prayers (c), (d), (e) and (f) of encl (86) with costs in the cause. B

[120] Mr Mathias Chang then applied to the court to set aside the writ of subpoena ad testificandum and duces tecum, encl (64A), in respect of the subpoenaed witness which was filed on 1 August 2013 by the plaintiff.

[121] Enclosure (64A) was, accordingly, struck out by the court. C

[122] Mr Mathias Chang then informed the court that the plaintiff will be applying for a writ of subpoena ad testificandum only in respect of Mr Yiap Tiew Kuang for the full trial scheduled on 19 and 20 December 2013. D

[123] The parties to the two applications in encls (92) and (96) ie Mr Yap Tiew Kuang and the plaintiff, then agreed that both enclosures be struck out by the court with no order as to costs.

[124] Both enclosures were, accordingly, struck out by the court with no order as to costs. E

[125] Upon the request of the plaintiff and the defendants, the court then set the case down for case management on 19 December 2013 to await the outcome of the plaintiff's appeal to the Court of Appeal against the decision of this court in respect of encl (83). F

[126] Before concluding, this court would like to reproduce below the meanings assigned to the following words and expressions by Bryan A Garner in the book *Black's Law Dictionary* (9th Ed), at p 1563: G

> 'subpoena n [Latin 'under penalty'] (15c) A writ or order commanding a person to appear before a court or other tribunal, subject to a penalty for failing to comply. — Also spelled subpena. Pl. subpoenas. H
>
> deposition subpoena. 1. A subpoena issued to summon a person to make a sworn statement in a time and place other than a trial. 1353; 2. In some jurisdictions, a subpoena duces tecum. 1354;
>
> friendly subpoena. A subpoena issued to a person or entity that is willing to testify or produce documents, but only if legally required to do so. • The subpoena may protect the information provider from retaliation from others because the provider is required to comply. — Also termed accommodation subpoena. I
>
> subpoena ad testificandum [Law Latin] (1807) A subpoena ordering a witness to appear and give testimony.

A subpoena duces tecum [Law Latin] (18c) A subpoena ordering the witness to appear in court and to bring specified documents, records, or thing. — Also termed deposition subpoena duces tecum.

subpoena, vb (17c) 1. To serve with a subpoena to appear before a court or other tribunal <subpoena the material witnesses>. 2. To order the production of B (documents or other things) by subpoena duces tecum <subpoena the corporate records>. — Also spelled subpena.

[127] In view of the above, it is clear that if Mr Mathias Chang had wished to record a witness statement from the subpoenaed witness in his office in the C form of an affidavit, he ought to have applied for a deposition subpoena as opposed to a subpoena *ad testificandum* because the latter is merely an order to compel the witness to appear in court and to testify before the court ie to give oral evidence before the court.

D **[128]** In my view, an application for a deposition subpoena on a witness who is a director of the first defendant ought to be served on the witness as well as the defendants in order to allow them the opportunity to object to it before it is granted by the court.

E **[129]** In my view, since the subpoena *ad testificandum* and *decus tecum* which was served on Mr Yiap Tiew Kuang did not specify the nature of the documents, records, etc which the plaintiff wished him to bring along with him to the court during the full trial, Mr Mathias acted correctly when he applied F orally to the court on 18 October 2013 to have set it aside.

[130] In view of the power and discretion conferred on the court by O 34 of the RC 2012, the direction given during the pre-trial case management proceeding of the instant case by the court to Mr Mathias to prepare, file and G serve a list of questions for Mr Yiap Tiew Kuang on him together with the subpoena and on the defendants is a proper direction as it would give notice to the witness and the defendants of the questions which are intended by the plaintiff to be posed to the witness during the full trial.

H **[131]** Where a question relates to any document which has been included in the common bundle of documents, this court will also direct that a copy of the document be attached to the list of questions and served on the witness together with the subpoena.

I **[132]** In this way the element of surprise to the witness and the opposing party is removed. In this way the anxiety on the part of the witness is also reduced considerably as the witness will be able to come to court ready with his answers to the questions and the full trial can proceed smoothly and expeditiously.

[133] Another advantage of such a direction is that the defendants can go through the list of questions and decide whether to take objection to any of the questions set out in the list of questions in the event that the questions are actually posed to the witness during the full trial by the party who has subpoenaed the witness. Hence, it is the standard practice of this court to give such a direction during pre-trial case management proceedings of cases in which any of the parties intend to subpoena a witness to testify during the full trial of the cases.

CONCLUSION

[134] Based on the reasons as set out above, I am of the respectful view that the plaintiff's application in encl (83) for the specific discovery of the EAR and to compel the defendants to amend their defences by deleting all references to the EAR therein and alternatively, for the court to strike out all references to the EAR therein was correctly dismissed with costs of RM15,000 to be paid by the plaintiff to the defendants.

Plaintiff's application dismissed with costs of RM15,000.

Reported by Ashgar Ali Ali Mohamed